Supreme Court, U.S.
FILED

97 1036 DEC 19 1997

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No.

IN THE

Supreme Court of The United States

OCTOBER TERM 1997

The Former Eastern Pilots Granted the Right to Substitute Counsel,

Petitioners,

v.

Continental Airlines,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals ignored the exclusively equitable remedy of airline pilot seniority integration through labor arbitration in airline mergers when it concluded that such remedy was a "claim" under Section 101(5) of the Bankruptcy Act which could be reduced to a monetary award in circumstances where the bankrupt estate has few, if any, assets.

2. Whether the Court of Appeals grossly misapplied Section 1113(f) of the Bankruptcy Act and ignored the policy of the National Labor Relations Act favoring arbitration of labor disputes by its holding on the one hand that Continental had not sought relief from the LPP provisions in the collective bargaining agreement pursuant to §1113(f) and had a duty to arbitrate the LPP issue, and its further ruling that substitution of a non-existent monetary award for the seniority list integration promised by the LPPs did not constitute an alteration of those provisions.

LIST OF PARTIES

The parties to the proceedings below were the petitioners, the former Eastern pilots granted the right to substitute counsel, the LPP Claimants and the respondent Continental Airlines.

The petitioners, the former Eastern pilots granted the right to substitute counsel are some of the members of the Eastern Pilots Merger Committee. There are no parent companies, subsidiaries or affiliates of the petitioners.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioners, the former Eastern pilots granted the right to substitute counsel, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in the above-entitled proceeding on August 29, 1997.[1]

Opinions Below

The decision of the Court of Appeals for the Third Circuit is reported at 125 F.3d 120, and the unpublished opinion is reprinted in the Appendix (hereinafter "A"), at A-2-35.

The decision of the District Court is unreported and the unpublished opinion is reprinted in the Appendix at A-36-73.

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[1] On September 10, 1997, the LPP Claimants, also appellants in the proceedings below, filed a petition for rehearing with the Court. The Third Circuit issued an order on September 23, 1997, denying the petition for rehearing. The Order is reprinted at A-1.

Jurisdiction

The decision of the Court of Appeals for the Third Circuit was entered on August 29, 1997. The order of the Court denying rehearing was entered on September 23, 1997. The jurisdiction of this Court to review the judgment of the Court of Appeals is invoked under 28 U.S.C. §1254.

Statutes Involved

The statutes that are involved in this case are:

1. Section 101(5) of the Bankruptcy Act, 11 U.S.C. §101, *et seq.*, which defines a "claim" in bankruptcy as follows:

> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
>
> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured or unsecured.

2. Section 1113(f) of the Bankruptcy Act which provides as follows:

> No provision of this title shall be construed to permit a trustee to unilaterally terminate or alter any provision of a collective bargaining agreement prior to compliance with the provisions of this section.

STATEMENT OF THE CASE

Eastern Agrees to Labor Protection Provisions

On February 23, 1986, Eastern and ALPA entered into a new collective bargaining agreement. In exchange for granting Eastern massive economic concessions, including

reduction in benefits and a 20% reduction in pay, ALPA obtained labor protection provisions (LPPs). In the evening hours of that date, the parties executed a memo containing the following language: "2. LPP's & Takeover Similar to TWA — need to work out between EAL/ALPA legal counsel." The next day, Frank Lorenzo, Chairman of Texas Air, who was on the verge of acquiring Eastern, was briefed by Al Gibson, Eastern Airlines' chief negotiator, by telephone on the terms of the new Eastern-ALPA agreement, including specifically the provision for LPPs. At the conclusion of the briefing, Lorenzo told Eastern officials, "Congratulations, Al, sounds like a good deal to me."

Texas Air Acquires Eastern And Starts A Process To Negate The ALPA Collective Bargaining Agreement And The LPPs

On February 24, 1986, Texas Air Corp., which already owned Continental, acquired Eastern and began a massive effort, together with Eastern, to negate various portions of the recently-concluded bargaining agreement, including the LPPs. On August 6, 1986, ALPA filed a grievance protesting Eastern's refusal to recognize the LPPs.

Before this grievance, Eastern had filed suit in the U.S. District Court for the Southern District of Florida alleging that no valid collective bargaining agreement existed between ALPA and Eastern. After receiving the August 6, 1986 grievance, Eastern amended its suit to allege that "no agreement presently exists between ALPA and Eastern with respect to [LPPs]." *Eastern Air Lines, Inc. v. Air Line Pilots Ass'n, Int'l*, 861 F.2d 1546, 1549 (11th Cir. 1988).

After substantial litigation between Eastern and ALPA regarding the enforceability of the LPP agreement, the Eleventh Circuit affirmed the district court's summary judgment decision in ALPA's favor and directed Eastern to submit the LPP dispute to arbitration, stating "They [the LPP claims] must now be arbitrated in accordance with the provisions of the Railway Labor Act." 861 F.2d at 1555.

The LPP Dispute Is Arbitrated

Pursuant to the order of the court, the LPP grievance proceeded before the Eastern-ALPA System Board of Adjustment, with Professor Frank Elkouri serving as neutral chairperson.

Professor Elkouri in his decision of September 22, 1989, found that the provisions of the agreement provided for "***meaningful*** LPP protection for pilots ***as a matter of contractual right***."

Specifically, Professor Elkouri held that the agreement of February 23, 1986, contained only Sections 2(a), 3 and 13 of the Allegheny-Mohawk LPPS.[2]

Section 2(a) provides as follows:

> The term "merger" as used herein means joint action by the two carriers whereby they unify, consolidate, merge, or pool in whole or in part their separate airline facilities or any of the operations or services previously performed by them through such separate facilities.

Section 3 provides as follows:

> Insofar as the merger affects the seniority rights of the carriers' employees, ***provisions shall be made for the integration of seniority lists in a fair and equitable manner***, including, where applicable, agreement through collective bargaining between the carriers and the representatives of the employees affected. In the event of failure to agree, the dispute may be submitted by either party for adjustment in accordance with section 13.
>
> (Emphasis added.)

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[2] The standard for labor protective provisions was first imposed by the Civil Aeronautics Board in the 1972 merger between Allegheny and Mohawk Airlines.

Section 13(a) provides as follows:[3]

> Section 13(a). In the event that any dispute or controversy (except as to matters arising under section 9) arises with respect to the protections provided herein, which cannot be settled by the parties within 20 days after the controversy arises, it may be referred by any party to an arbitrator selected from a panel of seven names furnished by the National Mediation Board for consideration and determination. The parties shall select the arbitrator from such panel by alternatively striking names until only one remains, and he shall serve as arbitrator. Expedited hearings and decisions will be expected, and a decision shall be rendered within 90 days after the controversy arises, unless an extension of time is mutually agreeable to all parties. The salary and expenses of the arbitrator shall be borne equally by the carrier and (i) the organization or organizations representing the employee or employees, or (ii) if unrepresented, the employee or employees or group or groups of employees. The decision of the arbitrator shall be final and binding on the parties.

The Value of LPPs To Pilots

Seniority is central to a pilot's career. For example, it determines the position the pilot flies (second officer, first officer or captain), with the resultant pay and retirement income consequences; the aircraft the pilot flies (smaller, narrow bodied aircraft or the larger equipment); the monthly schedule the pilot flies (shorter routes with many take-offs and landings or the longer routes); the number of days off in the monthly schedule; the amount and choice of vacation time.

In short, seniority determines a pilot's quality of work and life itself. These are some of the reasons pilots generally

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[3] Section 13(b) is not relevant to this case.

place a unique value on the seniority integration aspects of LPPs and why the Eastern pilots in particular made so many monetary concessions to gain LPPs.

Texas Air Orchestrates The Transfer Of Work And Assets From Eastern To Continental

After Texas Air acquired Eastern, it started a process of transferring assets from union-organized Eastern to its other airline subsidiary, non-union Continental. This strategy had a devastating impact on employment of pilots at Eastern. From 1986 to 1988, pilot employment at Eastern declined by 16.8%, whereas pilot employment at Continental increased by 125.2% during the same time period.

In fact, on June 16, 1988, Robert J. Snedeker, then Senior Vice President of Texas Air, stated that:

> Texas Air anticipated that Continental "would cherry-pick the core parts of the Eastern system and become in effect the substitute carrier." Mr. Lorenzo himself made remarks susceptible of a similar interpretation at a December 2, 1986 meeting of Continental's non-union pilots ....

Department of Transportation Requires Texas Air to Honor LPPs

From the time that Texas Air announced its proposed acquisition of Eastern, ALPA insisted that the Department of Transportation (DOT) condition any such acquisition on the imposition of LPPs. When the DOT declined to do so, ALPA challenged the approval in the U.S. Court of Appeals for the District of Columbia Circuit. The DOT's rationale for declining to impose LPPs as a condition of the merger was the ability of the unions and the carriers to voluntarily negotiate LPPs, as Eastern and ALPA had done in the current case.

The court decided in *Air Line Pilots Ass'n v. U.S. Department of Transp.*, 838 F.2d 563, 567 (D.C. Cir. 1988), that the DOT's general rationale for denying LPP protection was proper, but noted that the DOT

> acted in an arbitrary and capricious manner in failing to consider the possibility that these bargained-for [LPP] protections might be lost after the acquisitions were approved.[8/]
>
> [8/] This possibility seems most troublesome when a smaller, unionized carrier is acquired by a larger, non-unionized carrier, since the acquired carrier's employees presumably will have no representative to assert their interests following the acquisition.

The Court of Appeals remanded the case to the DOT to consider that issue.

In that remanded proceeding, the DOT found as follows:

> The Department accepts the stipulation filed of May 6, 1988, by ***Texas Air Corporation and Eastern Air Lines*** whereby Eastern Air Lines stipulates and represents that the Labor Protective Provisions which may be contained in any Eastern Air Lines collective bargaining agreement will not be extinguished by either (i) ..., or (ii) a corporate or operational merger between Eastern Air Lines and another carrier owned and operated by Texas Air corporation that leaves Eastern Air Lines employees unrepresented for collective bargaining purposes.

ALPA Commences LPP Arbitration To Obtain Eastern Pilot Seniority Integration On Continental Pilot Seniority List

Because ALPA was aware that the inter-corporate transfers from Eastern to Continental through Texas Air constituted a "merger" within the meaning of Section 2(a) of the LPPs, it requested in March 1989 that Frank Lorenzo, Chairman of Texas Air and Eastern, meet with ALPA to discuss integration of Eastern pilots into the Continental pilot seniority list. When this request was declined, ALPA requested that the National Mediation Board (NMB) proffer a list of seven arbitrators from which a neutral arbitrator would be chosen. By this time, however, Eastern had already filed

for bankruptcy on March 9, 1989. Eastern took the position in the bankruptcy court that the automatic stay of litigation provision prevented the LPP arbitration.

Second Circuit Court of Appeals Holds That The Automatic Stay Provision Does Not Bar LPP/Seniority Integration Arbitration Because Eastern Did Not Seek Relief From Collective Bargaining Agreement Pursuant to Section 1113

In the same fashion as Continental did in this case, Eastern went before the bankruptcy judge in the Southern District of New York and moved that the LPP/seniority integration arbitration be stayed pursuant to the automatic stay provisions of the Bankruptcy Act. ALPA opposed the motion on the ground that Eastern had not sought relief from the provisions of the Eastern-ALPA agreement pursuant to Section 1113 of the Bankruptcy Act. The bankruptcy court agreed with Eastern and stayed the LPP/seniority integration arbitration. The district court reversed the bankruptcy judge and the U.S. Court of Appeals for the Second Circuit agreed with the district court in *In re Ionosphere Clubs*, 922 F.2d 984 (2d Cir. 1990), *cert. denied*, 502 U.S. 808, 112 S.Ct. 50 (1991).

The LPP/Seniority Integration Arbitration Proceedings Begin Before Arbitrator Kasher

Shortly after the decision of the Second Circuit referred to above, Arbitrator Kasher, the arbitrator selected by the National Mediation Board pursuant to Section 13 of the LPPs, convened a pre-hearing proceeding on April 8, 1991, where ALPA and Eastern, but not Continental or any attorneys then representing groups of Continental pilots, participated. The Continental parties were invited to participate, but declined to do so.

On August 4, 1992, Arbitrator Kasher issued a 22-page decision in which he found, over Eastern's objection, that the LPP Section 13 forum was the appropriate one "for hearing

the issues related to the Association's petition for a seniority integration proceeding and other remedies which might be available." He also rejected Continental's argument that the automatic stay provision barred the arbitration on the basis of the district court's decision in *In re Ionosphere Clubs*, 114 B.R. 379 (S.D.N.Y. 1990), *aff'd in part, rev'd in part by* 922 F.2d 984 (2d Cir. 1990), *cert. denied*, 502 U.S. 808, 112 S.Ct. 50 (1991) (J.A. 352-353).

Arbitrator Kasher scheduled another pre-hearing conference on the LPP/seniority integration dispute on February 3, 1993 where various parties aired their views on the issues to be arbitrated. Again, the Continental parties were invited to participate but declined to do so.

The Final Effort To Derail The Kasher Arbitration And Deprive Eastern Pilots Of Their LPP Rights

On February 4, 1993, just one day after Arbitrator Kasher's re-opened hearing, Continental appeared in this case before Bankruptcy Judge Balick pursuant to an adversary proceeding commenced in that court on November 15, 1991, and a motion for partial summary judgment filed on January 29, 1992, seeking to halt the on-going Kasher LPP/seniority integration arbitration. In a second motion for summary judgment dated December 18, 1992, Continental assumed that Continental was bound by and breached the LPPs contained in the Eastern-ALPA collective bargaining agreement (A-34 & 67).

On February 11, 1993, Judge Balick granted the injunction against the continuation of the Kasher arbitration which she made permanent in confirming Continental's plan of reorganization on April 16, 1993.

The Decisions Below

With respect to the issues presented in this petition for certiorari, both the district court and the Court of Appeals held that the effort by the former Eastern pilots to vindicate their LPP rights to seniority integration through labor

arbitration constituted a "claim" under Section 101(5) of the Bankruptcy Act, thereby permitting such rights to be reduced to a monetary award.

The district court first noted that monetary damages were available for violations of the Railway Labor Act (A-62). Then noting that a violation of the Railway Labor Act was not alleged in the case, the district court held that "Courts generally view front pay as an 'alternative' to reinstatement," citing some Title VII and duty of fair representation cases (*Ibid.*). The district court acknowledged that the practical result of its conclusion was that:

> ... the right to arbitrate the LPP dispute may be of limited practical utility to the LPP Claimants. Any award that might be granted by the arbitrator would be an unsecured pre-petition claim and may come after the assets of the bankruptcy estate have been wholly depleted.

(A-70, n.31)

Like the district court, the Court of Appeals held that the LPP right of seniority integration through labor arbitration was similar to a wrongful discharge case, holding,

> We find support for the proposition that monetary awards are a viable alternative to the equitable remedy of seniority integration in wrongful discharge cases where we have enforced awards of monetary damages in lieu of reinstatement.

(A-28)

The Court of Appeals even speculated that money damages might be preferable to seniority integration because seniority integration "could potentially result in the displacement of many Continental pilots," allegedly causing "an environment rife with hostility and low employee morale, not to mention a detrimental effect on employer-employee relations." (A-30).

Despite these findings, both the district court and the Court of Appeals professed that their ruling on the "claim"

issue should not suggest or dictate the nature of the arbitrator's award (A-70, n.30; 20, n.8; 30).

Moreover, the Court of Appeals held that even though Continental did not seek relief from the LPP provisions of the collective bargaining agreement pursuant to Section 1113(f) and was bound to arbitrate the LPP dispute, the substitution of a nonexistent monetary award for the contractually-required seniority list integration did not constitute a termination or even an alternation of the LPP provisions of the agreement (A-34, n.15).

REASONS FOR GRANTING THE WRIT

1. The Importance of the Issue

Prior to deregulation of the airline industry in the late 1970's, labor protection provisions, guaranteeing, *inter alia*, a fair and equitable integration of pilot seniority lists by impartial arbitration, if necessary, were routinely imposed by the then Civil Aeronautics Board in cases of mergers between airlines starting with the Allegheny-Mohawk merger in 1972. After deregulation, the bargaining parties were advised that the government would not routinely impose LPPs in airline mergers and that the bargaining parties themselves should incorporate LPPs in their collective bargaining agreements if mutually agreed. *See Air Line Pilots Ass'n v. U.S. Department of Transp.*, 838 F.2d 563 (D.C. Cir. 1988). Since deregulation, most of the unionized air carriers and their pilot unions have incorporated LPPs – or, as in this case, a part of the LPPs – into their collective bargaining agreements.

Also since deregulation, there have been several cases where airlines have gone through Chapter 11 bankruptcies. In the case of Continental, it has gone through two such bankruptcies. Also since deregulation, there have been many airline mergers, several involving Continental itself (*see* n.5 *infra*).

Thus the issue of whether the fair and equitable seniority integration/arbitration aspect of the LPPs can be relegated to a

"claim" in bankruptcy, resulting in a total career loss and also generally resulting in little or no payment is an issue of vital (literally a lifetime career) concern to every airline pilot flying today and the hundreds of thousands that will follow them.

2. The Court Of Appeals Misapprehended Or Grossly Misapplied The Claim Provision Of The Bankruptcy Act In Depriving The Former Eastern Pilots Of Their Labor Protection Provision Promise Of A Fair And Equitable Seniority Integration With The Continental Pilots

The overarching purpose of the Bankruptcy Act is to give the debtor "a new opportunity in life with a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt" – often referred to as the "fresh start" policy. *See Grogan v. Garner,* 498 U.S. 279, 286 (1991).[4]

To this end, Congress enacted Section 101(5) of the Bankruptcy Act providing for the discharge in bankruptcy of "claims" as that term is defined in subsections A and B and quoted above.

The legislative history of the distinction between money claims, equitable claims that give rise to money claims, and pure equitable claims that do not give rise to money claims, discloses the following:

> Section 101(5)(B) represents a modification of the House-passed bill to include [in] the definition of "claim" a right to an equitable remedy for breach of performance if such breach gives rise to a right to payment. This is intended to cause the liquidation

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[4] Not only is Continental well into the fifth year of its "fresh start," but it has been highly profitable, showing, for example, a net profit of $223,545,000 in 1995 alone (May 10, 1996 *Aviation Daily*, Volume 324, No. 30, p. 246); a net profit of $319 million in 1996 (Jan. 22, 1997 *Aviation Daily*, Volume 327, No. 14, p. 121); and a net profit of $110 in just the third quarter of 1997 Oct. 17, 1997 *Aviation Daily*, Volume 330, No. 12, p. 99).

> or estimation of contingent rights of payment for which there may be an alternative equitable remedy with the result that the equitable remedy will be susceptible to being discharged in bankruptcy. For example, in some States, a judgment for specific performance may be satisfied by an alternative right to payment, in the event performance is refused; in that event, the creditor entitled to specific performance would have a "claim" for purposes of a proceeding under title 11. ***On the other hand, rights to an equitable remedy for a breach of performance with respect to which such breach does not give rise to a right to payment are not "claims" and would therefore not be susceptible to discharge in bankruptcy.***

124 Cong. Rec. 32,393 (1978) (remarks of Rep. Edwards); *id.* at 33,992 (remarks of Sen. DeConcini) (emphasis added).

As the literal wording of Sections 2(a), 3 and 13 of the LPPs disclose, the sole remedy provided in the event of merger is seniority integration, to be achieved, if necessary, by labor arbitration. There is no language permitting any inference that money damages are a remedy or alternative remedy to seniority integration.

In perhaps its most egregious error, the Court of Appeals held that money damages were an alternative remedy to seniority integration by relying on Section 1 of the LPPs which provides that,

> The fundamental scope and purpose of the conditions hereinafter specified are to provide for compensatory allowances to employees who may be affected by [a] proposed merger ....

(A-26, 30, n.10 & 12).

The problem with this analysis is that Professor Elkouri found in his arbitration award that only Sections 2(a), 3 and 13 of the standard LPPs were incorporated in the Eastern collective bargaining agreement. The Court of Appeals thus

relied on a provision of the LPPs not even contained in the Eastern contract.

Next, the Court of Appeals relied on a case cited by no party to the appeal process, *Van Waters & Rogers, Inc. v. Int'l Brotherhood of Teamsters Local Union 70,* 913 F.2d 736 (9th Cir. 1990) (A-26-28). That case, which did not even involve the Bankruptcy Act, held that where a union seeking seniority integration in arbitration was precluded from obtaining that relief by a collective bargaining agreement with a different union, the arbitrator acted appropriately by granting money damages to persons represented by the grievant union. The Court of Appeals concluded from its analysis of this case that,

> Rather, it [money damages] serves as a substitute or the performance of an equitable remedy ***that cannot otherwise be enforced.***

A-28 (emphasis added).

The italicized portion of the above quote is a factor that is totally absent in this case. There is simply no competing factor that precludes enforcement of seniority integration, and there is no money available for those pilots denied seniority integration. The record shows in fact that Continental has hired 131 pilots from January to April 1997 (*Aviation Daily*, 5/12/97, Vol. 328, No. 30, p. 249), and had further plans for substantial "off the street" hiring in the remainder of 1997 and through 1998 *Aviation Week and Space Technology*, 3/10/97, Vol. 146, No. 10, p. 48).

If the Court of Appeals was referring to its rank speculation at A-30 that seniority integration might "create an environment rife with hostility and low employee morale, not to mention a detrimental effect on employer-employee relations," such speculation was wholly misplaced.[5] As the district court held:

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[5] Indeed, Continental Airlines has recently absorbed pilots from New York Air, Frontier Airlines and People Express Airlines through LPP seniority integration with none of the adverse consequences speculated by

> In making his or her decision [on seniority integration] the arbitrator could take into account Continental's financial condition so as to prevent a slide back into bankruptcy. Because an arbitrator could structure the integration of seniority lists in a way that would not unduly risk Continental's continued progress or the investments of third parties, this court will decide whether the asserted right to seniority constitutes a claim in bankruptcy.

(A-54) And again responding to Continental's *in terrorem* arguments apparently accepted by this Court of Appeals, the district court held that,

> The present consequences of seniority list integration would certainly be less drastic. In addition, the arbitrator is not required to integrate the seniority lists strictly by "date of hire." An arbitrator would be charged with integrating the lists in a fair and equitable manner. If a strict "date of hire" integration scheme would be inequitable, an arbitrator would not order it.

(*Ibid.*, n. 12)

Failing to cite any cases involving the seniority list integration arbitration provisions of the LPPs, the Court of Appeals analogized the LPP claims of the Eastern pilots to "wrongful discharge cases where we have enforced awards of money damages in lieu of reinstatement" (A-28), This was also the rationale of the district court (A-62).

The Eastern pilots involved here were ***not discharged***. They lost jobs, they allege, by reason of an operational merger of Eastern with Continental, and they are not supplicants seeking reinstatement, but rather the pilot seniority integration contractually sealed in sections 2(a), 3 and 13 of the LPPs.

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the Court of Appeals, and has, in the process, become a highly profitable carrier.

Title VII, moreover, which is the statutory authority for most of the wrongful discharge cases cited by the Court of Appeals, expressly provides that the court may order "reinstatement ... with or without back pay ..., or ***any other equitable*** relief as the court deems appropriate" (42 U.S.C. §2000e-5(g); emphasis added). There is no comparable statutory or judicial provision for alternate or varying remedies to seniority integration pursuant to LPPs in a collective bargaining agreement under the Railway Labor Act or the Federal Aviation Act. In the absence of statutory provisions permitting "other relief," as found in the anti-discrimination laws, there is simply no legal basis for holding that relief other than the purely equitable seniority integration mandated by the LPPs is appropriate.

Assuming *arguendo* that it is proper for a bankruptcy court or district court to appropriate Title VII or other laws into the vindication of LPP rights under the Railway Labor Act and the Federal Aviation Act, the Court of Appeals nevertheless misstated the law under Title VII and other anti-discrimination statutes.

The law under these anti-discrimination statutes is not that front pay is an alternative to reinstatement, but rather that reinstatement is the preferred and presumptively appropriate remedy, and that front pay in lieu of reinstatement can only be granted in "exceptional" cases.

Thus most recently in *Squires v. Bonser*, 54 F.3d 168 (3d Cir. 1995), the Third Circuit itself stated:

> Reinstatement advances the policy goals of make-whole relief and deterrence ***in a way which money damages cannot***.

54 F.3d at 172-173 (emphasis added).

And further:

> [T]he court should deny reinstatement in a first amendment wrongful discharge case on the basis of equity ***only in exceptional circumstances***.

54 F.3d at 173 (emphasis added).

Finally, the Court ruled

> In order to deny reinstatement, more than the ordinary tensions accompanying an unconstitutional discharge lawsuit must be present. The fact that reinstatement might have "disturbing consequences" "revive old antagonisms", or "breed difficult working conditions" usually is not enough "to outweigh the important first amendment policies that reinstatement serves..."

54 F.3d at 175

In this case the Court of Appeals seeks to distinguish the *Squires* case on the basis that a constitutional violation was involved (A-29, n.11), requiring "the compelling need to enforce reinstatement to remedy the violation." What less compelling need is there in this case where the careers of hundreds of pilots are at stake?

Thus not only is reinstatement the preferred and presumptively appropriate remedy for such discharges because money damages cannot make the dischargee whole, but reinstatement should be ordered in all but the "exceptional" case, and finally that an exceptional case is not made out by simple antagonism or hostility of the employer or the employers' employees. This effectively disposes of Continental's self-stimulated and self-serving claims of alleged hostility of the Continental pilots toward the Eastern pilots' contractually-mandated LPP right to be integrated into the Continental pilot seniority list, a rampant speculation which the Court of Appeals amazingly embraced (A-30).

For other cases on point *see, e.g. Ellis v. Ringgold School Dist.*, 832 F.2d 27, 30 (3d Cir. 1987), *cert. denied*, 494 U.S. 1005, 110 S.Ct. 1298 (1990) ("Reinstatement is the preferred remedy to avoid future lost earnings", and that reinstatement ***with seniority*** is presumptively appropriate); *Maxfield v. Sinclair Int'l*, 766 F.2d 788, 796 (3d Cir. 1985), *cert. denied*, 474 U.S. 1057, 106 S.Ct. 796 (1986) ("Reinstatement is the preferred remedy to avoid future lost earnings ....").

Other circuit courts of appeal have also ruled that front pay is not an "alternative" to reinstatement, but rather that reinstatement is clearly the preferred remedy for a discriminatory discharge and that front pay in lieu of reinstatement can only be ordered in the exceptional case. *Brunneman v. Terra Int'l*, 975 F.2d 175, 180 (5th Cir. 1992); *Ford v. Nicks*, 866 F.2d 865, 875 (6th Cir. 1989); *In re Lewis*, 845 F.2d 624, 630 (6th Cir. 1988); *Rodgers v. Western-Southern Life Ins. Co.*, 12 F.3d 668, 678 (7th Cir. 1993), *Harper v. General Grocers Co.*, 590 F.2d 713, 716 (8th Cir. 1979) ("An award of retroactive seniority which places a victim of discrimination in that position in the seniority system that would have been his had the discriminatory act not occurred, is generally appropriate to redress a violation of Title VII"), *Bingman v. Natkin & Co.*, 937 F.2d 553, 558 (10th Cir. 1991), *Welborn v. Reynolds Metals Co.*, 868 F.2d 389, 391 (11th Cir. 1989); *Darnell v. Jasper*, 730 F.2d 653, 655 (11th Cir. 1984).

The case of *Allen v. Autauga County Bd. of Educ.*, 685 F.2d 1302, 1306 (11th Cir. 1982), often quoted by other courts of appeal, best explains the rationale for the presumptive rule of reinstatement as opposed to front pay and the fact that backpay and front pay address one remedial concern and restoration of a job with lateral seniority addresses an entirely separate remedial concern.[6]

> This rule of presumptive reinstatement is justified by reason as well as precedent. When a person loses his job, it is at best disingenuous to say that money damages can suffice to make that person whole. The psychological benefits of work are intangible, yet they are real and cannot be ignored.

(Emphasis added.)

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[6] *See In re Udell*, 18 F.3d 403, 409 (7th Cir. 1994), where the court ruled that where the equitable relief and money damages sought addressed "entirely separate remedial concerns," the equitable relief should not be considered a "claim" under the Bankruptcy Act.

Similarly, these Eastern pilots maintain that losing their pilot jobs at Eastern cannot be compensated by mere money damages (even if real money damages were available). For what is involved is work — a life-long career — with all its tangible and intangible benefits, such as the sheer love of flying, travel benefits, a secure retirement, the self esteem and self worth derived from a job well done, the emotional fulfillment of career advancement from second officer to first officer and finally, after years of preparation on a mature airline, to a captain position. All of these are basic and essential elements animating and driving the human spirit of a pilot. To claim that they can be "reduced" to nonexistent front pay is not only "disingenuous," but an unwarranted insult to all professional airline pilots.

Finally, on this point, there is federal judicial precedent, specifically involving LPPs and, ironically, Texas Air, holding that the sole remedy for this company's reneging on its commitment of LPP seniority integration to the pilots of People Express is for the court to order seniority integration arbitration. In *People Express Pilot Merger Committee v. Texas Air Corp.*, (D.N.J. 1989), *aff'd without opinion*, 958 F.2d 364 (3d Cir. 1992), Judge Politan ordered Texas Air to integrate the People Express pilots into the Continental pilot seniority list, after severely criticizing Texas Air for acknowledging its LPP obligation in one forum (the DOT) while denying those obligations in another forum (the court). This case is instructive for three reasons. First, it demonstrates Texas Air's pattern of repudiating its LPP commitments. Second, it demonstrates that the ***only*** remedy for failure to abide by LPP commitments is an order to submit the seniority integration issue to arbitration. It is obvious that in the People Express case, Texas Air had not yet conjured up its "front pay as an alternative to seniority integration" shell game. And third, it demonstrates that courts will enforce seniority integration with respect to a carrier like Continental which knowingly acquires assets from another carrier which is subject to an LPP agreement like Eastern, and then turns around and fails to do so.

3. The Decision Of The Court Of Appeals On The Claim Issue Unlawfully Usurps The Authority Of The LPP Arbitrator

Both the district court (A-70, n.30) and the Court of Appeals (A-20, n.8 & 30) profess that their decision on the issue of whether the pilot seniority list integration/arbitration issue is a "claim" under bankruptcy laws does not dictate or even suggest the decision that the arbitrator may make on the merits of seniority integration.

The Court of Appeals went further in agreeing with petitioners that Continental's failure to reject the collective bargaining agreement pursuant to Section 1113(f) of the Bankruptcy Act "operates to preclude the application of other bankruptcy code provisions to the advantage of debtor ... to permit them to escape the terms of a collective bargaining agreement ..." (A-32-33). In this respect, the Court of Appeals agreed with the Court of Appeals for the Second Circuit *In re Ionosphere*, 922 F.2d 984 (2d Cir. 1990), *cert. denied*, 502 U.S. 808.

Further, the Court of Appeals held that Continental had a duty on the merits to arbitrate the LPP issue (A-34-35).

Yet, in a footnote (A-34, n.15), the Court of Appeals makes the astounding assertion without benefit of authority that "substitution [by monetary damages] of the equitable remedy [seniority integration] in no way amounts to an alteration of the terms of the collective bargaining agreement."

The Court of Appeals is literally stating that the substitution of monetary damages (which all parties agree is nonexistent or practically nonexistent) with full seniority integration and a career job at Continental does not even "alter" the clear command of the LPPs that there ***shall*** be a fair and equitable integration of seniority lists.

This is Alice-in-Wonderland jurisprudence.

In addition, the decision of the Court of Appeals is totally at odds with the overriding labor relations policy

favoring arbitration of labor disputes and the deference to be accorded to labor arbitrators. *See United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578, 581 (1960) ("For arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself;" and "the labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed be foreign to the competence of courts"). In a related case, this Court warned the federal judiciary, including the bankruptcy courts, that "the refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements." *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 596 (1960).

By converting the purely equitable remedy of seniority integration into a meaningless "claim" for money damages, the Court of Appeals has impermissibly intruded into the collectively bargained arbitration process and decreed that any award of an arbitrator granting any type of relief, including seniority integration, is subject to review on the merits by the bankruptcy court. And further, that any such arbitration award will be totally changed into a money award in an estate without assets. Labor arbitration was never meant to provide an "empty bucket."

CONCLUSION

For the foregoing reasons, the petitioners respectfully request that the petition for certiorari be granted.

Respectfully submitted,

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A - 1

CONTINENTAL AIRLINES, INC.,

Appellant No. 96-7038

(Caption amended in accordance with Clerk's Order dated 3/4/96)

SUR PETITION FOR REHEARING

PRESENT: SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMANN GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, McKEE, and MICHEL,* Circuit Judges.

The petition for rehearing filed by appellant, LPP Claimants, in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

BY THE COURT,

/s/

Circuit Judge

Date: SEP 23 1997

C.C. | M.I. J.G.
J.M. L.J.
M.T.
R.B.

* Honorable Paul R. Michel, Circuit Judge for the United States Court of Appeals for the Federal Circuit, sitting by designation, whose vote is limited to panel rehearing only.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Filed August 29, 1997

Nos. 96-7028 and 96-7038

IN RE: CONTINENTAL AIRLINES,

Debtor

AIR LINE PILOTS ASSOCIATION

v.

CONTINENTAL AIRLINES
LPP CLAIMANTS; EFFECTIVE DATE COMMITTEE,

Claimants

HONORABLE JOHN STONITSCH,

Trustee

LPP CLAIMANTS,

Appellant No. 96-7028

(Caption amended in accordance with
Clerk's Order dated 3/4/96)

IN RE: CONTINENTAL AIRLINES,

Debtor

AIR LINE PILOTS ASSOCIATION

v.

CONTINENTAL AIRLINES
LPP CLAIMANTS; EFFECTIVE DATE COMMITTEE,

Claimants

HONORABLE JOHN STONITSCH,

Trustee

CONTINENTAL AIRLINES, INC.,

Appellant No. 96-7038

(Caption amended in accordance with
Clerk's Order dated 3/4/96)

ON APPEAL FROM THE
UNITED STATES DISIRICT COURT
FOR THE DISTRICT OF DELAWARE

(D.C. Civil No. 93-cv-00163)

ARGUED MARCH 13, 1997

BEFORE: MANSMANN, LEWIS and
MICHEL,* *Circuit Judges*.

(Filed August 29, 1997)

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* Honorable Paul R. Michel, Circuit Judge for the United States Court of Appeals for the Federal Circuit, sitting by designation.

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OPINION OF THE COURT

LEWIS, *Circuit Judge*.

In this appeal and cross-appeal, we are confronted with a tension between bankruptcy law and labor law. The dispute arose when the Air Line Pilots Association, Inc. ("ALPA"), collective bargaining agent for Eastern Air Lines' ("Eastern") pilots, filed proofs of claim in bankruptcy court against Continental Airlines Holdings, Inc. and Continental Airlines, Inc. ("Continental"). These claims were based on alleged seniority integration rights stemming from a pending labor arbitration dispute and were filed following Continental's acquisition of Eastern and subsequent refusal to bargain over the seniority integration of Eastern's pilots.

The bankruptcy court determined that the claims could be satisfied by monetary awards in lieu of specific performance and enjoined scheduled arbitration proceedings to enforce the seniority rights under the collective bargaining agreement. The district court affirmed the bankruptcy court's determination relating to the claims, but vacated the injunction. Two groups of former Eastern pilots, the LPP Claimants and the Group of 31, both of which are no longer represented by ALPA, appealed to this court.[1]

Resolution of this dispute requires us to determine: (1) whether the bankruptcy claims that the LPP Claimants and the Group of 31 seek to enforce constitute "claims" within the meaning of the bankruptcy code and thus are satisfiable, in

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[1] "LPP Claimants" refers to a group of former Eastern pilots whose claims in this appeal are based on certain "labor protective provisions" (LPPs) contained in the collective bargaining agreement. The "Group of 31" is a group of former Eastern pilots, who originally were part of the "LPP Claimants" group and who have retained separate counsel for purposes of this appeal. *See* discussion *infra* Part I.D. While both groups claims were filed in bankruptcy court by ALPA on their behalf, these two groups are no longer represented by ALPA. *See* discussion *infra* note 5.

the alternative, by a monetary award; and (2) whether the arbitration of a labor dispute that may give rise to the right to seniority integration under a collective bargaining agreement can be enjoined, where the debtor has not explicitly rejected the agreement. We conclude that the rights to seniority integration do constitute "claims" within the meaning of the bankruptcy code. Accordingly, we find that the right to seniority integration gives rise to a right of payment and that any equitable remedy recovered against Continental via arbitration of the underlying labor dispute may be satisfied through an award of monetary damages. We further conclude that the district court properly vacated the injunction barring arbitration of the underlying labor dispute. Thus, we will affirm.

I.

A. *The Underlying LPP Dispute*

On February 23, 1986, following intense negotiations, Eastern and its pilots' union, ALPA, ratified a collective bargaining agreement. On February 24, 1986, the Texas Air Corporation ("Texas Air"), parent corporation to Continental, acquired Eastern. Believing that the acquisition constituted a "merger" within the meaning of certain "labor protective provisions" (LPPs) contained in the collective bargaining agreement, ALPA requested a meeting with Texas Air, Eastern, and Continental to discuss the integration of Eastern's and Continental's seniority lists. Under the LPPs, Eastern's pilots secured protection of their seniority rights in the event of a merger between Eastern and another airline carrier through the integration of Eastern's seniority lists with the merging carrier's list. Specifically, the LPP terms provide:

> Section 2(a). The term "merger" as used herein means joint action by the two carriers whereby they unify, consolidate, merge, or pool in whole or in part their separate airline facilities or any of the operations or

> services previously performed by them through such separate facilities.
>
> * * *
>
> Section 3. Insofar as the merger affects the seniority rights of the carriers' employees, provisions shall be made for the integration of seniority lists in a fair and equitable manner, including, where applicable, agreement through collective bargaining between the carriers and the representative of the employees affected. In the event of failure to agree, the dispute may be submitted by either party for adjustment in accordance with section 13.
>
> * * *
>
> Section 13(a). In the event that any dispute or controversy . . . arises with respect to the protections provided herein, which cannot be settled by the parties within 20 days after the controversy arises, it may be referred by any party to an arbitrator selected from a panel of seven names furnished by the National Mediation Board for consideration and determination.

(Labor Protective Provisions, sections 2(a), 3, and 13(a)).[2]

Despite ALPA's requests, both Eastern and Continental refused to bargain with ALPA about the integration of the seniority lists. Consequently, ALPA requested the National Mediation Board to proffer a list of seven arbitrators from which a neutral arbitrator could be chosen to determine whether an alleged merger occurred between Eastern and Continental that triggered the LPP seniority integration

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[2] The LPPs were based on the standard Allegheny-Mohawk LPPs, which were designed to provide "displacement and dismissal allowances to employees adversely affected by [merger] transaction[s], the equitable integration of seniority lists, and binding arbitration of disputes relating to the LPPs." (Decision of the Eastern Air Lines Pilots System Board of Adjustment). *See Air Line Pilots Ass'n v. Dept. of Transp.*, 838 F.2d 563, 565 (D.C. Cir. 1988) (citing *Allegheny-Mohawk Merger Case*, 59 C.A.B. 22 (1972)).

provision (LPP dispute). Eastern, however, filed for bankruptcy in March, 1989, and refused to submit to arbitration pursuant to the bankruptcy code's section 362 automatic stay provision. 11 U.S.C. § 362 (providing that petitions filed pursuant to Chapter 11 operate as a stay of the commencement or continuation of judicial, administrative, or other actions or proceedings against the debtor). In bankruptcy court, ALPA sought relief from the automatic stay to compel Eastern to arbitrate the LPP dispute. The bankruptcy court denied ALPA's petition. After much litigation, however, the Court of Appeals for the Second Circuit held that the section 362 automatic stay provision did not preclude arbitration in this instance. *See In re Ionosphere Clubs, Inc.*, 922 F.2d 984 (2d Cir. 1990).

ALPA and Eastern proceeded to arbitration in April, 1991, commencing with a pre-hearing conference before Richard R. Kasher (Kasher Arbitration). In this proceeding, ALPA sought prospective integration of seniority lists, back pay from the effective date of the merger to the date of the arbitration award, and front pay from the date of the arbitration award to the date that the Eastern pilots would complete training and begin flying for Continental. Prior to the pre-hearing conference, Arbitrator Kasher solicited brief statements of position from the parties to the dispute, and from all potential parties. Eastern consistently maintained that the LPP dispute was not properly within the arbitrator's jurisdiction.[3] Continental filed a statement informing Arbitrator Kasher that it had filed a Chapter 11 petition for reorganization in December, 1990. Therefore, it maintained that the arbitration pursued by ALPA was stayed under section 362 of the bankruptcy code and could not proceed without the express approval of the bankruptcy court.

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[3] Eastern maintained that only the System Board of Adjustment had jurisdiction to determine whether a merger occurred that triggered the LPPs. On the merits, Eastern contended that if the arbitration proceeded, the Arbitrator should conclude that no merger occurred.

In August, 1992, Arbitrator Kasher issued a decision concluding that he had jurisdiction over the LPP dispute, and could render a determination of the appropriate remedies under the circumstances. Kasher, relying on the bankruptcy court's determination in *In re Ionosphere Clubs, Inc.*, 114 B.R. 379 (Bankr. S.D.N.Y. 1990), specifically rejected Continental's suggestion that the arbitration was barred by the automatic stay. Kasher scheduled hearings on the merits of the dispute, to commence in February, 1993.

B. *The Bankruptcy Court Proceedings*

In September, 1991, while the initial Kasher Arbitration decision was pending, ALPA, on behalf of its members, filed proofs of claim against Continental in Delaware Bankruptcy Court. Their claims were based on the asserted right to seniority integration under the LPPs and specified an unliquidated amount as the debt for which Continental was obligated. In response, Continental initiated an adversary proceeding in bankruptcy court against ALPA, seeking injunctive and declaratory relief relating to the proofs of claim. In that action, Continental filed a Partial Objection To Allowance of Claims and a Motion for Partial Summary Judgment on its Partial Objection.[4] In both motions, Continental contended that the seniority integration that the claimants sought was not feasible because it would be detrimental to Continental's successful reorganization. Thus, Continental sought a declaration that the claims were, at best, "general, dischargeable, pre-petition, unsecured claims," compensable by an award of monetary damages.

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[4] Prior to the Kasher Arbitration decision, Continental filed an initial motion for partial summary judgment, seeking a preliminary injunction. Continental argued that the arbitration should be enjoined to protect the jurisdiction of the bankruptcy court over the administration of its estate. It also maintained that the automatic stay provision of the bankruptcy code precluded the arbitration from proceeding. Finally, Continental contended that it was not a party to the collective bargaining agreement between Eastern and ALPA and that it could not be bound by the result of any arbitration over the LPPs.

ALPA and the LPP Claimants each filed a separate response to Continental's Partial Objection and Motion for Partial Summary Judgment.[5] ALPA contended that, contrary to Continental's argument, the claims pursued were not general, unsecured pre-petition claims that could be converted to a payment of money damages. ALPA also argued that only an arbitrator had jurisdiction to determine the appropriate remedy under the LPPs. The LPP Claimants essentially maintained that an arbitration proceeding was the appropriate forum to determine the issue of whether a merger occurred that triggered the LPPs, and that the proper remedy was integration of Eastern's seniority lists with Continental's lists.

In February, 1993, the bankruptcy court Judge, in two orders, granted Continental's Partial Objection To Allowance of Claims and its related motion for partial summary judgment, determining that there was no genuine issue for trial and that Continental was entitled to judgment as a matter of law. *In re Continental Airlines, Inc., et al.*, Nos. 90-932 through 90-984 (Bankr. D. Del. Feb. 11, 1993) (order granting motion for partial objection to allowance of claims); *In re Continental Airlines, Inc., et al.*, No. 91-153 (Bankr. D. Del. Feb. 11, 1993) (order granting motion for partial summary judgment). Addressing the jurisdictional argument asserted by ALPA, the bankruptcy court concluded that the issue of whether any award granted to ALPA would constitute general, unsecured, pre-petition claims was a core matter under the bankruptcy code. Thus, it concluded that it had jurisdiction to resolve the matter. *In re Continental Airlines, Inc., et al*, Nos. 90-932 through 90-984, slip op. at 1-2 (order granting motion for partial objection to allowance of claims); *In re Continental Airlines, Inc., et al*, No. 91-153, slip op. at 2 (order granting motion for partial summary judgment). The

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[5] ALPA's representation of the LPP Claimants ceased after the LPP Claimants instituted actions in federal court against ALPA. The actions alleged causes of action for the breach of the duty of fair representation and defamation arising out of the publication and dissemination of a "blacklist" and for alleged violations of the civil provisions of RICO.

court then determined that the equitable remedy of seniority integration constituted a "claim" within the meaning of § 101(5) of the bankruptcy code. Accordingly, the court concluded that the remedy could be converted to an award of money damages. *In re Continental Airlines, Inc., et al*, Nos. 90-932 through 90-984, slip op. at 3-4 (order granting motion for partial objection to allowance of claims); *In re Continental Airlines, Inc., et al.*, No. 91-153, slip op. at 3-4 (order granting motion for partial summary judgment). Finally, the court determined that any right of payment asserted by ALPA was, at best, a general, dischargeable, unsecured claim that was entitled to no administrative priority. *In re Continental Airlines, Inc., et al.*, Nos. 90-932 through 90-984, slip op. at 4-5 (order granting motion for partial objection to allowance of claims); *In re Continental Airlines, Inc., et al*, No. 91-153, slip op. at 5 (order granting motion for partial summary judgment).

In April, 1993, Continental's Second Amended Joint Plan of Reorganization was confirmed by the bankruptcy court. The court's confirmation order incorporated its prior rulings from the two orders issued in February, 1993. Essentially, it clarified that any valid claims based on the LPPs would give rise to a right of payment dischargeable in bankruptcy and that no right to injunctive, equitable or other prospective relief would flow from any valid claim based on an award under the LPPs. *In re Continental Airlines, Inc., et al.*, Nos. 90-932 through 90-984 (Bankr. D. Del. April, 1993) (Findings of Fact, Conclusions of Law and Order Confirming the Debtors' Revised Second Amended Joint Plan of Reorganization). The court also enjoined the arbitration of the LPP dispute. Continental's plan of reorganization was consummated in late April, 1993.

C. *The ALPA/Continental Settlement*

ALPA and the LPP Claimants appealed the bankruptcy court's February and April, 1993 orders to the district court. While the appeals were pending, ALPA and Continental settled the LPP dispute. The Settlement Agreement, ultimately approved by the bankruptcy court, finally resolved all of ALPA's claims including those pursued in Continental's

bankruptcy proceeding and those based on the enforcement of the LPPs in the Kasher Arbitration. Under the terms of the agreement, ALPA agreed to withdraw its appeals to the district court. The Settlement Agreement also provided an option to the "pilots formerly employed by Eastern" who were no longer represented by ALPA, and who had filed proofs of claim in the bankruptcy proceeding, to participate in the settlement. Approximately two-thirds of these pilots did so.

D. *The District Court Proceedings*

Prior to the ALPA/Continental settlement, Continental filed a motion to dismiss ALPA's and the LPP Claimants' appeals. Continental argued that the appeals from the confirmation order were moot because: (1) the plan of reorganization had been substantially consummated; (2) it was not feasible for the plan to be undone; and (3) any alteration to the plan's fundamental terms would be inequitable. After the settlement, Continental filed a second motion to dismiss the appeals as moot, contending that the LPP Claimants had no individual right to maintain their claims based on the LPPs because ALPA, as the exclusive bargaining representative of the Eastern pilots, had full authority to settle the LPP grievance. Thus, Continental argued, the pilots were bound by the settlement agreement.

In a comprehensive memorandum opinion, the district court addressed the issues appealed by ALPA and the LPP Claimants and presented in Continental's motions to dismiss.[6] As to the first motion to dismiss, the court concluded, *inter alia* that ALPA's and the LPP Claimants' appeals relating to the claim for administrative priority was moot. In support of its conclusion, the court emphasized the substantial consummation of the plan. Specifically, the court noted that

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[6] Although the ALPA/Continental settlement agreement provided that ALPA would dismiss its appeal to the district court, ALPA failed to do so prior to the district court's disposition. Ultimately, ALPA did withdraw its claims against Continental. ALPA is not a party to this appeal.

the investment leading to the consummation of the plan was based on an overall limit on administrative claims and a determination that ALPA and the LPP Claimants were not entitled to equitable relief. *In re Continental Airlines, Inc., et al.*, No. 93-163 (D. Del. Nov. 29, 1995). As to Continental's second motion to dismiss as moot, the court determined that it could not consider the merits of whether the LPP Claimants had standing under the LPPs to pursue seniority integration individually. Specifically, the court concluded that this issue should be determined by the arbitrator. Therefore, the court refused to dismiss their claims based on their alleged lack of standing to assert the contractual right. *Id.* at 22-25. The court also rejected Continental's argument that the LPP Claimants were bound by the ALPA/Continental settlement. *Id.* at 23.

Turning to the merits of the appeals, the court affirmed the orders of the bankruptcy court in all respects, except for the bankruptcy court's injunction of the arbitration proceedings. *Id.* at 26-45. Relating to the injunction, the court concluded that the bankruptcy court's failure to adequately set forth the reasons for the issuance of the injunction and to describe the acts restrained in its order, as mandated by Federal Rule of Civil Procedure 65(d), was fatal to the validity of the injunction. *Id.* at 34-37. Although it vacated the injunction, the district court refused to remand the matter to the bankruptcy court with instructions to strike the injunction. Rather, the court concluded that under section 1113 of the bankruptcy code, the bankruptcy court could not enjoin the arbitration even if the requirements of Rule 65(d) were met. *Id.* at 37-40.[7]

The LPP Claimants appealed the district court's order. Continental cross-appealed on the issues of the mootness of

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[7] The court reached this issue only after determining that in spite of the invalidity of the injunction under Rule 65(d), the statutory injunction under 11 U.S.C. § 524, referenced by the bankruptcy court in its order, survived. *In re Continental Airlines, Inc., et al*, No. 93-163. slip op. at 37, (D Del. Nov.29, 1995).

the claims and the dissolution of the injunction. On appeal, the Group of 31, a group of former Eastern pilots who previously had been represented by counsel for the LPP Claimants, have obtained substitute counsel, and have filed a separate brief. For purposes of brevity, the Group of 31 and the LPP Claimants will be referred to collectively as "the Claimants" where permissible.

The district court had jurisdiction under 28 U.S.C. § 158(a). We exercise jurisdiction of the appeal and the cross-appeal from the district court's order pursuant to 28 U.S.C. § 158(d).

II.

Our review of the district court's determination is plenary. *Brown v. Pennsylvania State Employees Credit Union*, 851 F.2d 81, 84 (3d Cir. 1988); *see In re Ionosphere Clubs, Inc.*, 922 F.2d 984, 988 (2d Cir. 1990). We exercise the same review of the district court's decision as that exercised by the district court. *Brown*, 851 F.2d at 84. The bankruptcy court's findings of fact are reviewable only for clear error. *Id.* Legal determinations are subject to plenary review. *Id.*

Before we reach the merits of the parties' claims, we must address Continental's two challenges to the Claimants' appeals contending that the appeals should be dismissed. First, Continental maintains that the LPP Claimants' notice of appeal is defective for lack of adequate identification of the parties to the appeal under Federal Rule of Appellate Procedure 3(c). Next, Continental argues that the Claimants' lack standing to assert claims for individual seniority integration under the LPPs and that the appeals should be dismissed as moot.

A. *Appellate Jurisdiction*

Continental requests that the LPP Claimants' appeal be dismissed pursuant to Federal Rule of Appellate Procedure 3(c) for failure of their notice of appeal to identify each member of its group participating in this appeal. The notice of appeal filed by the LPP Claimants simply identifies the appellants as "the LPP Claimants." Continental argues that this identification is insufficient, emphasizing that a number of the LPP Claimants participated in the Continental/ALPA settlement and,

consequently, waived their claims on appeal. Continental contends that the notice of appeal did not specify those members who did not waive their claims and who are appealing from the district court's order. We reject this argument, and conclude that the LPP Claimants notice of appeal adequately identifies the appellants.

The requirements of Rule 3(c) are jurisdictional. *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 320-21, 108 S. Ct. 2405, 2411, 101 L.Ed.2d 285 (1988). In *Torres*, the Supreme Court explained that permitting a court to exercise jurisdiction over parties not named in a notice of appeal would be equivalent to extending the time prescribed to file a notice of appeal, a power not granted to the court. *Id.* at 315. Thus, the failure of a notice of appeal to name a party constitutes a jurisdictional bar to the appeal, and thus a failure of that party to appeal. *Dura Systems, Inc. v. Rothbury Investments, Ltd.*, 886 F.2d 551, 554 (3d Cir. 1989).

Generally, rules of procedure should be liberally construed. *Torres*, 487 U.S. at 316. In *Torres*, the Supreme Court emphasized that, "mere technicalities should not stand in the way of consideration of a case on its merits." *Id.* (internal quotations omitted). Thus, in the context of Rule 3(c), jurisdiction may be appropriate if a litigant's actions are functionally equivalent to the requirements of Rule 3(c). *Masquerade Novelty v. Unique Industries*, 912 F.2d 663, 665 (3d Cir. 1990). We have applied this construction numerous times to support a finding of jurisdiction in the absence of strict, technical compliance with the requirements of Rule 3(c). *See id.* (where the contents of documents filed within the time prescribed to file a notice of appeal contain the information required by Rule 3(c), the party will be deemed to have complied with the rule and the case will not be dismissed for lack of appellate jurisdiction); *Dura Systems, Inc.*, 886 F.2d at 554-55 (Consent Order filed by the appellants within the time prescribed to file a notice of appeal served as the "functional equivalent" of what Rule 3(c) required such that the technical failure of the actual notice of

appeal was not a bar to jurisdiction); *see also In re Bertoli*, 812 F.2d 136 (3d Cir. 1987) (litigant's filing of a "Notice of Motion for Certification of An Interlocutory Appeal" in the district court within the thirty-day time period allowed to file a notice of appeal was sufficient to satisfy Rule 3(c) where the litigant failed to file an actual notice of appeal; the document communicated an intention to appeal and identified the judgment appealed from and the court to which the appeal was taken).

The purpose of Rule 3(c)'s identification requirement is to provide notice to the court and the opposing parties of the identity of the appellants. *Torres*, 487 U.S. at 318; *Dura Systems, Inc.*, 886 F.2d at 555. Since ALPA and the LPP Claimants filed their appeals in the district court, the LPP Claimants have been identified as a group of former Eastern pilots, no longer represented by ALPA, seeking to enforce their seniority integration rights under the LPPs. When ALPA settled its claims with Continental, both Continental and ALPA, via the settlement agreement, granted the LPP Claimants the opportunity to participate in the settlement. Continental was well aware of the individuals who elected to exercise this option. The settlement agreement specifically required those pilots electing to participate in the settlement to execute one of two forms indicating an intent to participate in the settlement and to return the form to Continental. Those individuals who opted to settle their claims waived their right to appeal. Thus, the group of LPP Claimants dwindled to an identifiable, discrete entity made up of those individual pilots who chose not to participate in the settlement.

The term "LPP Claimants" has been subject to a common understanding among all parties to this litigation relating to the individuals comprising the group. Accordingly, we conclude that the LPP Claimants' notice of appeal sufficiently identifies the entity such that Continental, as well as this Court, is adequately apprised of the identity of the appellants such that appellate jurisdiction is proper. In so doing, we follow the Supreme Court's directive to construe

Rule 3(c) liberally and to avoid a construction that would permit "mere technicalities" to bar the consideration of this case on the merits. *Masquerade Novelty*, 912 F.2d at 666 (quoting *Dura Systems*, 886 F.2d at 555).

B. *Whether the Claimants' Appeals are Moot*

Continental argues that the Claimants' appeals are moot, relying on ALPA's settlement of its LPP dispute with Continental. Essentially, Continental maintains that the claim settled by ALPA was a "group" claim. Thus, Continental argues, when ALPA settled the dispute, it settled the claim on behalf of the entire group on whose behalf it filed the bankruptcy claims, including the Group of 31 and the LPP Claimants. According to Continental, then the relevant question is whether "if [individual rights to seniority integration arbitration under the LPPs] existed at all, [those] rights survived ALPA's settlement of the group grievance." In the district court, Continental challenged the LPP Claimants' individual standing under the LPPs to prosecute their rights to seniority integration. The district court declined to consider the merits of this argument, explaining that the issue constituted a "minor" dispute under the Railway Labor Act, 45 U.S.C. §§ 151-163, and was subject to the jurisdiction of the arbitrator. We conclude that because the Claimants' individual rights to prosecute their claims for seniority integration have not been established under the LPPs, we need not address whether the Claimants' individual rights to seniority integration survived ALPA's settlement of the dispute.

The right to seniority integration under the LPPs turns on whether a "merger" between Eastern and Continental occurred within the meaning of the LPPs. This determination depends on the meaning, interpretation and proper application of the LPPs. In turn, the issue of standing to maintain an individual claim for seniority integration under the LPPs is a "minor" dispute under the Railway Labor Act, 45 U.S.C. §§ 151-163. *See Consolidated Rail v. Labor Executives*, 491 U.S. 299, 302 (1989) ("major disputes seek to create contractual rights,

minor disputes to enforce them") (*quoting Elgin, J & E. Ry. Co. v. Burley*, 325 U.S. 711, 723, 65 S. Ct. 1282, 1289-90, 89 L.Ed. 1886 (1945) (minor disputes are those relating either to the meaning or proper application of a particular provision with reference to a specific situation)); *Chicago & Northwestern Transp. v. Local Union* 214, 829 F.2d 1424, 1427 (7th Cir. 1987). Accordingly, the issue of standing is subject to the exclusive jurisdiction of the arbitrator, and the district court properly concluded that its role relating to this issue was to protect the jurisdiction of the arbitration board. Consolidated Rail 491 U.S. at 304 ("the [National Railroad Adjustment] Board . . . has exclusive jurisdiction over minor disputes. Judicial review of the arbitral decision is limited."); *Chicago & Northwestern Transp.*, 829 F.2d at 1428.

Consistent with the federal courts' role relating to minor disputes, i.e., to protect the jurisdiction of the arbitration board, federal courts cannot inquire into the merits of an underlying dispute except to the extent necessary to determine its proper characterization as minor or major. *Chicago & Northwestern Transp.*, 829 F.2d at 1428. Nor may the courts decide what remedy is appropriate if the agreement is interpreted to require recovery of a remedy. *General Com of Adj., United Transp. Union v. CSX R.R.*, 893 F.2d 584, 592-93 (3d Cir. 1990). Thus, the district court properly concluded that it could not consider the merits of Continental's argument that the Claimants did not have standing under the LPPs. As the Claimants' right to prosecute their claims for seniority integration have not been established under the LPPs, we find that we need not address Continental's argument that their individual rights did not survive ALPA's settlement of the LPP dispute.

C. *Merits of the Appeal*

1. *Bankruptcy Court's Jurisdiction*

Before we determine whether the bankruptcy court properly determined the status of the Claimants' claims, we must address the Claimants' contention that the bankruptcy

court did not have Jurisdiction over the matter. The Claimants maintain that because the LPP dispute arose wholly outside the bankruptcy context, the matter is a "non-core" dispute over which the bankruptcy court did not have jurisdiction. The flaw in the Claimants' argument is that they confuse the disposition of the merits of the underlying LPP dispute with the treatment of their claims in bankruptcy. The bankruptcy court had exclusive jurisdiction over the latter.

A bankruptcy court has jurisdiction over all "core proceedings arising under title 11, or arising in a case under title 11." 28 U.S.C. § 157(b)(1) (1993); *In re Wood*, 825 F.2d 90, 95 (5th Cir. 1987). Section 157(b) does not define "core proceedings." However, the phrase has been interpreted to apply to those rights that are created by federal bankruptcy law:

> If the proceeding involves a right created by the federal bankruptcy law, it is a core proceeding . . . If the proceeding is one that would arise only in bankruptcy, it is also a core proceeding; for example, the filing of a proof of claim or an objection to the discharge of a particular debt.

In re Wood, 825 F.2d at 97. *See Beard v. Braunstein*, 914 F.2d 434 (3d Cir. 1990) (acknowledging the standard for "core proceedings" articulated in *Wood*).

There can be no dispute that the issue as to whether the bankruptcy claim could be satisfied by a monetary award is a "core bankruptcy matter." By filing a proof of claim against Continental's estate in bankruptcy court, the Claimants "invoke[d] the special rules of bankruptcy concerning objections to the claim, [and] estimation of the claim." *Wood*, 825 F.2d at 97. Further, the issue decided by the bankruptcy court was how the claim would be treated in bankruptcy. Thus, the bankruptcy court was well within its authority to exercise jurisdiction over the issue of the status of the bankruptcy claim. Our conclusion is consistent with principles that govern the disposition of issues when bankruptcy law and labor law intersect. *See L.O. Koven &*

Brothers, Inc. v. Local Union No. 5767, 381 F.2d 196, 205 (3d Cir. 1966) ("Questions involving an interpretation of the Bankruptcy Act should be decided by the court, while questions involving an interpretation of the collective bargaining agreement should if feasible be decided by the arbitrator."); *see also Garland Coal & Mining Co. v. United Mine Workers*, 778 F.2d 1297, 1304 (8th Cir. 1985) ("Once the arbitrator has decided the liability issue, the case should be returned to the bankruptcy court to decide the questions of allowability and priority of claims."). Accordingly, we conclude that the bankruptcy court had jurisdiction to determine whether the Claimants' claims could be satisfied by a monetary award in lieu of specific performance.[8]

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[8] For the same reasons. we reject the Group of 31's efforts to invoke the Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.*, to implicate the bankruptcy court's jurisdiction to determine how the claims will be treated in bankruptcy. Section 1 of the Norris-LaGuardia Act provides:

> No court of the United States as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter.

29 U.S.C. § 101.

The Group of 31 contends that despite the district court's order vacating the injunction the ruling that the remedy in arbitration can be "reduced" from full seniority integration to a claim for front pay "is as clearly an injunction and interference with the Kasher arbitration as was the bankruptcy court's blanket injunction against the continuation of the arbitration." The conversion of the equitable remedy to front pay, upon successful challenge at the arbitration proceedings, only affects the administration of the claim in bankruptcy. It does not operate to enjoin the arbitrator, nor does it dictate any particular remedy. *Cf. Lukens*, 989 F.2d at 677 (order directing an arbitrator not to preside over any newly ordered arbitration and deeming prior arbitration ineffectual involved operated as an injunction). Thus, we will not disturb the bankruptcy court's exercise of jurisdiction over the matter.

Similarly we reject the Claimants' argument that the determination whether the equitable remedy can be converted to a payment of money

2. *Whether the Equitable Remedy Constitutes a Claim Under the Bankruptcy Code*

The LPP Claimants' and the Group of 31's primary contention on appeal is that the right to the equitable remedy of seniority integration under the LPPs cannot be converted into a claim for money damages. The Claimants emphasize that they seek specific performance under the LPPs, and they vehemently argue that the payment of money damages is not a viable alternative to the equitable right to seniority integration.

The district court rejected the Claimants' argument, holding that seniority integration under the LPPs gave rise to a "right of payment" within the definition of a "claim" under the bankruptcy code. In support of its conclusion, the district court further determined that money damages are a viable alternative to seniority integration.

The bankruptcy code defines "claim" as

> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

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damages is inconsistent with the district court's conclusion that the individual right to seniority integration under the LPPs involves a "minor" dispute, subject to the exclusive jurisdiction of the arbitrator. *See* discussion, *supra* Part II.B. We discern no inconsistency between the bankruptcy court's exercise of jurisdiction to determine the status of the bankruptcy claim and the district court's characterization of the issue of the Claimants' standing under the LPPs as a "minor" dispute. The bankruptcy court's ruling related only to the manner in which the Claimants' claims in bankruptcy would be treated if a right to seniority integration is established. This ruling, unlike the standing issue, does not turn on an interpretation of the LPPs. Thus, the bankruptcy court's determination of the status of the claims and the district court's refusal to consider the merits of the standing issue was not inconsistent.

11 U.S.C. § 101(5). The term "claim" as defined in the bankruptcy code is construed broadly to permit debtors to meet all of their legal obligations in bankruptcy and to enable holders of claims to participate in the bankruptcy proceedings. *See Ohio v. Kovacs*, 469 U.S. 274, 279, 83 L.Ed.2d 649, 105 S. Ct. 705 (1985) ("Congress desired a broad definition of claim."); *see, e.g., Pennsylvania Dep't of Public Welfare v. Davenport*, 495 U.S. 552, 558 (1990) (debtors' obligation to pay restitution as a condition of probation which arose out of a criminal conviction for welfare fraud constituted a "debt" within the meaning of the bankruptcy code that gave rise to a "claim" under the code).

Under section 101(5), an equitable remedy can be deemed a "claim" if that remedy "gives rise to a right of payment." We are guided as to what constitutes a "right of payment" under the bankruptcy code by the Supreme Court's analysis in *Ohio v. Kovacs*. In *Kovacs*, the petitioner, the State of Ohio, obtained an injunction ordering the respondent, William Kovacs, to clean up a hazardous waste site. After Kovacs failed to comply with the injunction, the State obtained the appointment of a receiver, who was directed to take possession of all of Kovacs' assets and property and to clean up the waste site. Subsequent to the appointment of the receiver, Kovacs filed for bankruptcy. In response, the State filed a complaint in bankruptcy seeking a declaration that Kovacs' obligation under the injunction was not dischargeable in bankruptcy because it was not a liability on a "claim" under the bankruptcy code.

The Supreme Court held that the obligation imposed by the injunction had been converted to an obligation to pay money that was dischargeable in bankruptcy. *Kovacs*, 469 U.S. at 283. Critical to the Court's conclusion was its determination that the appointment of a receiver had dispossessed Kovacs of the property and therefore, had removed Kovacs' ability to cooperate with the receiver and remove the waste from the site in compliance with the injunction. Specifically, the Court stated:

> The injunction surely obliged Kovacs to clean up the site. But when he failed to do so, rather than prosecute Kovacs under the environmental laws or bring civil or criminal contempt proceedings, the State secured the appointment of a receiver, who was ordered to take possession of all of Kovacs' nonexempt assets . . . and to comply with the injunction . . . . As wise as this course may have been, it dispossessed Kovacs, removed his authority over the site, and divested him of assets that might have been used by him to clean up the property . . . Although Kovacs had been ordered to "cooperate" with the receiver, he was disabled by the receivership from personally taking charge of and carrying out the removal of wastes from the property. What the receiver wanted from Kovacs after bankruptcy was the money to defray cleanup costs . . Had Kovacs furnished the necessary funds, either before or after bankruptcy, there seems little doubt that the receiver and the State would have been satisfied.

Id. at 283. Thus, the Court concluded that under the circumstances, the clean up order had been converted into an obligation to pay money. *Id.* at 283.

In *In re Torwico Electronics, Inc.*, 8 F.3d 146 (3d Cir. 1993), we addressed the issue whether a regulatory obligation directing a Chapter 11 debtor to develop a plan to ameliorate an ongoing environmental hazard could be converted into a "claim" in bankruptcy. In that case, Torwico Electronics, a manufacturing business, filed for Chapter 11 bankruptcy and listed the New Jersey Department of Environmental Protection and Energy (the "Department") as a creditor with a disputed and unliquidated claim. After Torwico filed its petition for bankruptcy, the Department performed an on-site inspection of Torwico's property and found hazardous waste, for which it issued a notice of violation to Torwico. Two months later, the deadline for filing proofs of claim in Torwico's bankruptcy case passed. The Department had failed to file any proof of claim by this deadline.

The Department, seeking to enforce Torwico's obligation under state and federal environmental laws, issued an Administrative Order requiring Torwico to submit a written closure plan for the hazardous site and assessing a monetary penalty for failure to take action under the earlier notice of violation. The Order specifically stated: "All obligations are imposed pursuant to the police powers of the State of New Jersey, intended to protect the public health, safety, welfare, and environment."

In bankruptcy court, both parties sought summary judgment. Torwico maintained that the obligation constituted a "claim" under the bankruptcy code and that the State's failure to file a timely proof of claim was fatal to the State's position that Torwico was responsible for the obligation. The State, however, argued that the claims involved were regulatory obligations, not bankruptcy claims, and that Torwico was obligated to remedy the violations addressed in the Order pursuant to state and federal law.

Turning our attention to the Supreme Court's analysis in *Kovacs*, we explicitly noted that this case was unlike *Kovacs* in that the State was not demanding that Torwico pay money to it, but rather was requesting it to take action to ameliorate an ongoing hazard. *Torwico Electronics*, 8 F.3d at 150. Next, we shifted our focus to the nature of the obligation imposed by the Order and concluded that it was not an order for breach of an obligation that gave rise to the right of payment. Specifically, we noted:

> The state here found that the seepage pit was a continuing problem that was leaking hazardous material into the surrounding environment. Thus, the state is not asserting a "repackaged claim for damages"; rather there is an ongoing and continuing threat and . . . an obligation on the part of the debtor to "ameliorate ongoing pollution emanating from accumulated wastes" . . . The state has no "right to payment" here. What it has is a right to force the debtor to comply with applicable environmental laws by remedying an existing hazard.

Id. (quoting *In re Chateauguay*, 944 F.2d 997 1008 (2d Cir. 1991))[9]

Kovacs indicates, and *Torwico Electronics* implies, that a right of payment under the bankruptcy code is, essentially, an obligation to pay money. Thus, the issue we must decide is whether monetary payment is an alternative for the equitable remedy of seniority integration. *See Matter of Udell*, 18 F.3d 403, 407 (7th Cir. 1994) ("[an] example of a 'claim' is a right to an equitable remedy that can be satisfied by an 'alternative' right to payment"). The district court answered this question affirmatively, and we agree.

We begin our analysis by noting that here, when ALPA filed its proof of claim in bankruptcy court, it enumerated the claim as one for money damages, in addition to specific performance, arising out of the underlying LPP labor arbitration dispute. Indeed, in its supplemental pre-hearing statement filed at the arbitration, ALPA specifically noted that it sought "damages in the form of back pay and front pay against . . . Continental . . . in addition to integrated pilot positions." This is not the end of our inquiry, however. Consistent with the analyses in *Kovacs* and *Torwico Electronics*, we are compelled to examine the nature of the remedy sought and to ascertain whether it can give rise to a right of payment. We conclude that it does.

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[9] In *Torwico Electronics*, we were persuaded by, and explicitly applied, the approach adopted by the Court of Appeals for the Second Circuit in *In re Chateauguay*, 944 F.2d 997 (2d Cir. 1990). In that case, the court addressed the issue of what constituted a claim in the context of the bankruptcy of an entity that operated hazardous waste sites. There, the court stated:

> Where an order imposes obligations distinct from any obligation to stop or ameliorate ongoing pollution, the order presents a claim if the government could have done the work itself and then sought reimbursement: under such circumstances there is a breach of an obligation that gives rise to a right of payment.

In re Chateauguay, 944 F.2d at 1008.

Unlike the obligation at issue in *Torwico Electronics*, seniority integration is not a remedy tailored to enforce compliance with any federal or state laws or regulations. The source of the remedy is a provision contained in an agreement. By its contractual nature, it is clear that the remedy was not created to enforce compliance with any particular mandate. Rather, by its terms, seniority integration is a discrete remedy, specifically created to protect a group of employees.[10] Thus, the remedy is a vehicle by which to provide a benefit or compensation to individuals who are covered by the explicit terms of the agreement and who, by the agreement's terms, are entitled to enforce the remedy.

Although the collective bargaining agreement is silent as to the remedy following a breach of the agreement, it is reasonable to conclude that a "corollary right to payment of liquidated damages" would flow from a breach giving rise to the equitable remedy under the LPPs. *See Matter of Udell*, 18 F.3d at 408 (holding that a right to an equitable remedy for breach of performance is a claim if the same breach also gives rise to a right of payment with respect to the equitable remedy or if the right to payment is an alternative to the right to an equitable remedy). *See generally Chauffeurs, Teamsters, Etc. v. Terry*, 494 U.S. 558, 108 L.Ed.2d 519, 110 S. Ct. 1339 (1990) (claim based on breach of a collective bargaining agreement is comparable to a breach of contract claim for which a legal award of money damages in the form of back pay is permitted); *Stewart v. KHD Deutz of America Corp.*, 75 F.2d 1522 (11th Cir. 1996) (breach of [collective bargaining claim] claim is most analogous to a claim for breach of contract). The Court of Appeals for the Ninth Circuit's

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[10] The LPPs specifically state:

> Section 1. The fundamental scope and purpose of the conditions hereinafter specified are to provide for compensatory allowances to employees who may be affected by [a] proposed merger . . . .

(Labor Protective Provisions, section 1).

opinion in *Van Waters & Rogers, Inc. v. Int'l Brotherhood of Teamsters*, 913 F.2d 736 (9th Cir. 1990), is instructive.

In that case, the court upheld an award of monetary damages for breach of a contract mandating seniority integration. There, Van Waters, a seller and distributor of chemicals, purchased its competitor, McKesson. Pursuant to the acquisition, Van Waters agreed to assume the terms and conditions of a collective bargaining agreement that existed between McKesson and its employees' union, Local 70. Although the collective bargaining agreement contained a seniority integration clause triggered by a purchase or sale of McKesson, Van Waters refused to honor the terms of the clause after the purchase was complete. Accordingly, Local 70 filed a grievance based on Van Waters' failure to integrate the seniority of the former McKesson employees with Van Waters' seniority list.

Arbitration of the dispute was complicated by two additional factors. First, Van Waters maintained a collective bargaining agreement with another union, Local 287. Second, the collective bargaining agreement between Local 70 and McKesson/Van Waters contained a clause precluding the arbitrator from determining any jurisdictional dispute arising between Local 70 and any other union. The effect of the latter factor was that any ruling on a jurisdictional dispute would be outside of the scope of the arbitrator's authority. As seniority integration of Local 70's employees would affect the seniority of Van Waters' employees and create a potential conflict between the two unions, resolution of the dispute implicated the arbitrator's authority to resolve the dispute.

At the arbitration hearing, the arbitrator granted Local 70's grievance demanding that the seniority of the former McKesson employees be considered as integrated. However, the arbitrator declined to enforce seniority integration to avoid any jurisdictional dispute. Instead, the arbitrator ruled that the employees would receive damages for any wages and other benefits lost due to Van Waters' failure to consider their seniority. In so ruling, the arbitrator noted that the Local 70

agreement contained a provision that permitted the recovery of damages by employees arising out of an employer's failure to require a purchaser to assume the obligations of the collective bargaining agreement. The Ninth Circuit upheld the arbitrator's award, concluding that the arbitrator properly fashioned a monetary award to the former McKesson employees "for the breach of the terms of Local 70's collective bargaining agreement." *Id.* at 742.

Van Waters illustrates that a monetary damage award can be enforced as an alternative to, or can arise with respect to, the equitable remedy of seniority integration. The award is not cumulative, nor does it address a separate remedial concern. Rather, it serves as a substitute for the performance of an equitable remedy that cannot otherwise be enforced. *See Van Waters*, 913 F.2d at 741 ("if violated, [the seniority rights provided under the collective bargaining agreement] could be remedied by an award of damages rather than specific performance.").

We find support for the proposition that monetary awards are a viable alternative to the equitable remedy of seniority integration in wrongful discharge cases where we have enforced awards of monetary damages in lieu of reinstatement. Much like reinstatement, seniority integration is a "make whole" remedy, the purpose of which is to restore the employee to the economic status quo that would exist but for the employer's conduct. *See Franks v. Bowman Trans. Co.*, 424 U.S. 747, 766 (1976).

Although we have recognized that reinstatement is the preferred remedy to address cases of wrongful discharge, we have enforced monetary awards as a viable alternative where reinstatement is impractical. *See Maxfield v. Sinclair International*, 766 F.2d 788 (3d Cir. 1985) (front pay is an appropriate alternative to reinstatement where the relationship between the parties may be so damaged by animosity that reinstatement is impracticable and the remedial purposes of the statute would be frustrated if front pay were not available as an alternative remedy); *Goss v. Exxon Office Systems Co.*,

747 F.2d 885 (3d Cir. 1984) (same); *see also Ellis v. Ringgold School District*, 832 F.2d 27 (3d Cir. 1987) (reinstatement may be denied when animosity between the parties makes such remedy impracticable). *Cf. Squires v. Bonser*, 54 F.3d 168 (3d Cir. 1994) (special circumstances indicating that tensions between the parties exceed those which normally accompany reinstatement or indicating "irreparable" animosity among the parties involved justifies denial of reinstatement).[11] Similar to the conditions that can result from the enforcement of reinstatement, disruption to the work environment, irreparable damage to work relationships, and hostility and animosity are all very probable conditions that can result from the enforcement of seniority integration. Considering the similarity in purpose between the two remedies, the rationale underlying the enforcement of an alternative remedy to fulfill their remedial purposes, and the similarity in the impracticality of enforcing the remedies under particular circumstances, we are certain that a money damage award is an appropriate alternative to seniority integration.

Moreover, we are convinced that the particular circumstances of this case might make the enforcement of the

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[11] *Squires* is distinguishable. That case involved an employee who challenged the district court's failure to direct reinstatement to his former position after a jury sustained a First Amendment constitutional challenge to his employer's failure to reappoint him. Reversing the district court's decision not to reinstate the employee, we stated, "[t]he fact that reinstatement might have disturbing consequences, revive old antagonisms, or breed difficult working conditions usually is not enough to outweigh the important first amendment policies that reinstatement serves [absent] probable adverse consequences [that] weigh so heavily that they counsel the court against imposing this preferred remedy." *Squires*, 54 F.3d at 175 (quoting *Banks v. Burkich*, 788 F.2d 1161, 1165 (6th Cir. 1988)). Thus, it is clear that our decision to remand with instructions to reinstate the appellant was driven by the constitutional nature of the claims and the compelling need to enforce reinstatement to remedy the violation. As the claims here do not involve constitutional concerns, we cannot conclude that any remedy short of seniority integration will not suffice to remedy the alleged violation.

equitable remedy of seniority integration impractical such that an alternative money damage award would be appropriate. The seniority integration sought by the LPP Claimants and the Group of 31 could potentially result in the displacement of many Continental pilots. Such displacement has the potential to create an environment rife with hostility and low employee morale, not to mention a detrimental effect on employer-employee relations.[12] The circumstances indicate that seniority integration would not be a feasible remedy and that an alternative remedy of monetary damages would be appropriate. Therefore, we conclude that the right to seniority integration gives rise to a "right of payment" such that the remedy constitutes a "claim" dischargeable in bankruptcy.

We take care to note the boundaries of our holding. It is not our purpose to suggest the award the arbitrator should grant, if an award is warranted upon disposition of the LPP dispute. Our holding is limited to how the claims should be treated in bankruptcy. Simply put, we hold that any claim based on an award of seniority integration arising out of the resolution of the LPP dispute will be treated as a claim in bankruptcy giving rise to a right of payment. As such, the right to seniority integration is satisfiable by the payment of money damages.

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[12] We note that nothing about the imposition of monetary damages as a substitute for seniority integration frustrates the remedial purpose of the LPPs. *Cf. Franks*, 424 U.S. at 771 (in a Title VII case, "the denial of seniority relief to victims of illegal racial discrimination in hiring is permissible 'only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination.'"). Indeed, the LPPs set forth as its scope and purpose "to provide for compensatory allowances to employees who may be affected by the proposed merger of " the carriers. *See* discussion *supra* note 2. An award of monetary damages is consistent with the articulated scope and purpose, and is therefore appropriate.

D. *Arguments of Appellee/Cross-Appellant Continental*

1. *Dissolution of the Injunction*

Continental challenges the district court's ruling vacating the injunction against the continuation of the Kasher Arbitration on two grounds. First, it argues that contrary to the district court's conclusion, the permanent injunction, imposed by the Plan of Confirmation, complied with the mandate of Rule 65(d).[13] Next, it contends that if the permanent injunction did not comply with Rule 65(d), the statutory injunction referenced in the bankruptcy court's confirmation order survived the permanent injunction and is valid. We need not decide whether the permanent injunction failed to comply with the mandate of Rule 65(d). We conclude that even assuming that the statutory injunction survived the permanent injunction and is not subject to the requirements set forth in Rule 65(d), Continental's failure to reject the collective bargaining agreement consistent with the mandate of section 1113 of the Code renders the injunction invalid.

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[13] Section 12.19 of the plan of reorganization provided:

> 12.19 *Injunction Relating to Eastern Claims.* This Joint Plan permanently enjoins, and the Confirmation Order shall constitute and provide for a permanent injunction against, any Person or entity, including without limitation, (i) any present or former employee of Eastern . . . (ii) any labor union or collective bargaining representative acting or purporting to act on behalf of any such employees or former employees . . . from commencing, conducing or continuing any suit, arbitration, action or other proceeding in any place or forum against any Debtor. . . . This injunction shall apply, without limitation, to any suit, arbitration, action or proceeding.

(Debtors' Revised Second Amended Joint Plan of Reorganization, § 12. 19).

Federal Rule of Civil Procedure 65(d) states:

> Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained. . . .

Fed.R.Civ.P. 65(d).

The Confirmation Order issued by the bankruptcy court specifically incorporated the statutory injunction prescribed by the bankruptcy code. The order states:

> In accordance with section 524 of the Bankruptcy Code . . . this Order:
>
> (ii) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt or Claim as a personal liability of the Debtors . . . .

(Findings of Fact, Conclusions of Law and Order Confirming The Debtors' Revised Second Amended Joint Plan of Reorganization).

Assuming, as the district court did and as Continental argues, that the section 524 statutory injunction is not subject to the requirements of Rule 65(d), we conclude that the district court properly vacated the injunction against the Kasher Arbitration. Section 1113 of the Code provides:

> (a) The debtor in possession, or the trustee if one has been appointed under the provisions of this chapter . . . may assume or reject a collective bargaining agreement only in accordance with the provisions of this section.

11 U.S.C. § 1113(a). The provision outlines the procedure that a debtor or appointed trustee must follow to successfully reject a collective bargaining agreement, including, but not limited to: (1) the submission of a proposal to an authorized representative of the employees affected by the terms of the agreement prior to the filing of an application to reject the agreement, 11 U.S.C. § 524(b)(1)(A); and (2) good faith attempts to reach a "mutually satisfactory modification" of the agreement, 11 U.S.C. § 524(b)(2).

The intent behind section 1113 is to preclude debtors or trustees in bankruptcy from unilaterally terminating, altering, or modifying the terms of a collective bargaining agreement without following its strict mandate. *In re Ionosphere*, 922 F.2d at 989-90. Moreover, the provision operates to preclude

the application of other bankruptcy code provisions to the advantage of debtors and trustees to permit them to escape the terms of a collective bargaining agreement without complying with the requirements of section 1113. *See id.*

Continental does not dispute that it did not follow the requirements set forth in section 1113 to reject the collective bargaining agreement. Instead, Continental suggests that the imposition of the injunction was consistent with the bankruptcy court's authority to determine the administrative priority and status of the bankruptcy claims. Thus, it argues, section 1113 cannot divest the bankruptcy court of jurisdiction to exercise this authority and impose the injunction. We disagree.[14]

The injunction allowed Continental to avoid its obligation to arbitrate the merger dispute under the LPPs. In *In re Ionosphere*, the Court specifically held that the application of the section 362 automatic stay provision to effectuate this result in the absence of the debtor's compliance with the requirements of section 1113 was impermissible, as its application would allow a debtor unilaterally to avoid its obligation to arbitrate." *In re Ionosphere*, 922 F.2d at 993. Here, the enforcement of the statutory injunction in the face of Continental's failure to follow the requirements of section 1113 is no different. As the enforcement of the injunction would have the effect of permitting Continental to escape its duty to arbitrate under the collective bargaining agreement, we decline to enforce the statutory injunction in the absence

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[14] We have not been required previously to address the applicability of arbitration under collective bargaining agreements when the employer is in bankruptcy, although the issue was raised in a case we decided last year. *See Antol v. Esposto*, 100 F.3d 1111, 1121 n.4 (3d Cir. 1996) ("[W]e need not decide that interesting issue here."). This case however requires us to do so.

of Continental's compliance with the requirements to reject the collective bargaining agreement.[15]

2. *Duty to Arbitrate*

Finally, we reject Continental's argument that it has no duty to arbitrate the LPP dispute. Throughout this litigation, Continental has premised its arguments on the assumption that it is bound by the LPPs and has a duty to arbitrate the LPP dispute. In so doing, Continental reaped enormous benefits: (1) it was able to obtain a ruling that the claim based on seniority integration could be treated as a right to payment in bankruptcy, satisfiable by a monetary award; and (2) in turn, it received backing from investors for its plan of reorganization, which was critical to plan confirmation by the bankruptcy court.[16] Now, Continental maintains that there has

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[15] Despite our conclusion that failure to comply with section 1113 bars an injunction of the arbitration, we reject the Claimants' contention that the substitution of a monetary damage award, in lieu of seniority integration is not permitted under section 1113 because it alters or modifies the terms of the collective bargaining agreement. The bankruptcy court's determination of the administrative priority and status of the claims was not based on an interpretation of the LPPs. Nor did it predetermine the appropriate remedy warranted under the LPPs, thus "nullifying" the agreement and infringing on the arbitrator's jurisdiction. Substitution of the equitable remedy in no way amounts to an alteration or termination of the terms of the collective bargaining agreement.

[16] It is apparent that Continental assumed this position in efforts to obtain judicial confirmation of its plan of reorganization. In its Motion for Partial Summary Judgment, Continental stated:

> 1. [Debtors] make this Motion For Partial Summary Judgment On Their Partial Objection to Claims Based On Certain Alleged Labor Protective Provisions Involving The Air Line Pilots Association, International ("ALPA") And Eastern Air Lines, Inc. ("Eastern") in order to ensure that they will be able to reorganize successfully and, more specifically, to satisfy a condition of the Investment Agreement dated November 9, 1992 ("Investment Agreement"), by and among [the investors] and the Debtors. In addition to monetary damages, these claims seek to require Continental to hire several thousand Eastern Air Lines pilots, which if granted would necessitate the displacement of an equal number of incumbent Continental pilots. Debtors seek in this

been no determination that it is bound by the LPPs and that the case should be remanded to the district court for a determination on the merits of its duty to arbitrate the dispute.

In light of the overwhelming advantage that Continental derived from maintaining the position that it was bound by the collective bargaining agreement, and thus, had a duty to arbitrate the LPP dispute, we refuse to allow Continental to repudiate that representation and return to the district court to litigate the issue whether it is bound by the agreement. *See EF Operating Corp. v. American Bldgs.*, 993 F.2d 1046, 1050 (3d Cir. 1993) ("one cannot casually cast aside representations, oral or written, in the course of litigation simply because it is convenient to do so . . . a reviewing court may properly consider the representations made in the appellate brief to be binding as a form of judicial estoppel, and decline to address a new legal argument based on a later repudiation of those representations."). Accordingly, we conclude that Continental is bound by its prior representations that it has a duty to arbitrate the LPP dispute.

III.

For the foregoing reasons, we affirm the district court's decision in all respects.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

Motion a legal determination that the "LPP Claims" . . . are, at best, dischargeable, prepetition general unsecured claims within the meaning of the Bankruptcy Code Section 101(5).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Bankruptcy Court
Case Nos. 90-932 through 90-984

In re: CONTINENTAL AIRLINES, INC. *et al.*,

Debtors,

AIRLINE PILOTS ASSOCIATION, INTERNATIONAL, and LPP CLAIMANTS,

Appellants,

v.

CONTINENTAL AIRLINES, INC. *et al.*,

Appellees.

C.A. No.: 93-163, 93-164, 93-177, 93-178, 93-250, 93-255, 94 - 496

Consol. 93-163 LON

ORDER

NOW, THEREFORE, for the reasons set forth in the Court's Memorandum Opinion issued this date,

IT IS ORDERED that:

1. The appeal originally captioned 93-163 is denied, and the bankruptcy court's Order is affirmed.

2. The appeal originally captioned 93-164 is denied, and the bankruptcy court's Order is affirmed.

3. The appeal originally captioned 93-177 is denied, and the bankruptcy court's Order is affirmed.

4. The appeal originally captioned 93-178 is denied, and the bankruptcy court's Order is affirmed.

5. The appeal originally captioned 94-496 is denied, and the bankruptcy court's Order is affirmed.

6. The appeals originally captioned 93-250 and 93-255 are granted in part and denied in part. The bankruptcy court's Order of April 16, 1993, is affirmed, except the permanent injunction contained in Section 12.19 of the Plan of Reorganization is hereby vacated.

11/29/95 */s/*

Joseph J. Longobardi, D. J.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

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Debtors,

AIRLINE PILOTS ASSOCIATION, INTERNATIONAL, and LPP CLAIMANTS,

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Appellees.

C.A. No.: 93-163, 93-164, 93-177, 93-178, 93-250, 93-255, 94 - 496

Consol. 93-163 LON

Stephen W. Spence, Esquire, Phillips, Goldman & Spence, Wilmington, Delaware, Attorney for Claimant-Appellant Air Line Pilots Association; Michael J. Isaacs, Esquire, Agostini, Levitsky & Isaacs, Attorney for Claimant-Appellant LPP Claimants.

Laura D. Jones, Esquire, Young, Conaway, Stargatt & Taylor, Wilmington, DE; Attorneys for Debtors-Appellees.

MEMORANDUM OPINION

November 29, 1995
Wilmington, Delaware

/s/
LONGOBARDI, District Judge

I. FACTUAL BACKGROUND

This bankruptcy appeal involves claims against the debtor, Continental Airlines, Inc. ("Continental"), by two parties: the Air Line Pilots Association, International ("ALPA") and a group of approximately six hundred former Eastern Airline Pilots ("LPP Claimants"). The claims arise out of labor protective provisions ("LPPs") included in a collective bargaining agreement executed by Eastern Air Lines, Inc. ("Eastern") and ALPA.

The collective bargaining agreement was signed at 2:45 a.m. on February 24, 1986. *Eastern Air Lines v. Airline Pilots Ass'n Int'l*, 670 F.Supp. 947, 949 (S.D. Fla. 1987), *aff'd* 861 F.2d 1546 (11th Cir 1988). The collective bargaining agreement simply provided, "LPP's & Takeover Similar to TWA -- need to work out between EAL/ALPA legal counsel." In an arbitration decision dated September 22, 1989, a panel of the Eastern-ALPA System Board of Adjustment chaired by Professor Frank Elkouri interpreted that language to encompass sections 2(a), 3, and 13 of the standard "Allegheny-Mohawk LPP's."[1]

In accordance with those LPPs, if Eastern and another carrier were to "unify, consolidate, merge, or pool in whole or in part their separate airline facilities or any of the operations or services previously performed by them" in a manner affecting the seniority rights of the Eastern pilots, "provisions shall be made for the integration of seniority lists in a fair and equitable manner." Provisions for seniority integration were to have been made through collective bargaining, but if collective bargaining failed to yield results, then the dispute

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[1] At one time, the Civil Aeronautics Board ("CAB") required merging airlines to adopt these form LPPs as a condition of approving a merger. Since deregulation, the Department of Transportation generally leaves the issue of LPPs to collective bargaining.

was to be referred to an arbitrator selected from a panel of seven arbitrators furnished by the National Mediation Board. The LPPs further provided that the expenses of the arbitrator were to be shared equally by the carrier and either (1) the organization representing the employees or (2) if unrepresented, the employee or group of employees.

Shortly after the collective bargaining agreement between Eastern and ALPA was signed, Texas Air Corporation ("Texas Air")[2] acquired Eastern. *Eastern Air Lines v. Airline Pilots Ass'n Int'l*, 861 F.2d at 1548. Texas Air was Continental's corporate parent company. ALPA and the LPP Claimants allege that after Texas Air acquired Eastern, Eastern and Continental merged or combined in a way that triggered the LPPs. Continental asserts that all of the events constituting an alleged merger occurred before Continental filed for bankruptcy on December 3, 1990, while ALPA contends that the merger continued after the bankruptcy filing. (D. I. 9 at 12). ALPA relies on events which occurred on February 14, 1991, to show that the merger of Eastern and Continental continued after December 3, 1990. The bankruptcy court, however, dismissed these factual allegations, first offered at oral argument, stating "Defendants have not, as required by Fed.R.Civ.P. 56(e), set forth specific facts by affidavits or as otherwise provided by the Rule showing that there is a genuine issue for trial."

Despite the requests of ALPA, Eastern and Continental refused to bargain over the integration of seniority lists. ALPA then attempted to arbitrate the LPP dispute with the National Mediation Board. On March 9, 1989, however, Eastern had filed a petition for reorganization under Chapter 11 of the Bankruptcy Code. Eastern cited the Bankruptcy Code's automatic stay of litigation and refused to participate in the arbitration. The United States Court of Appeals for the Second Circuit held that Eastern must submit to arbitration

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[2] Since June 6, 1990, Texas Air has been known as Continental Airlines Holdings, Inc.

because "[a]pplication of the automatic stay to ALPA's attempt to invoke [the arbitration] provision of the collective bargaining agreement would allow Eastern unilaterally to alter the collective bargaining agreement by avoiding its obligation to arbitrate." *In re Ionosphere Clubs, Inc.*, 922 F.2d 984, 992-93 (2d Cir. 1990), *cert. denied*, 502 U.S. 808 (1991).

Continental filed a petition for Chapter 11 bankruptcy in Delaware on December 3, 1990. Subsequently, ALPA initiated an arbitration against Eastern regarding the LPP dispute before Richard R. Kasher ("Kasher Arbitration"). ALPA claimed to be entitled to three types of damages for the alleged breach of the LPPs. (D. I. 9 at 9). ALPA sought (1) the prospective integration of seniority lists; (2) back pay from the effective date of the merger to the date of the arbitration award; and (3) front pay from the issuance of the arbitration award to the date that the Eastern pilots would complete training and begin revenue flying for Continental. The only money that may still be available to satisfy the claims for monetary relief is a reserve of unallocated stock. (*See* D. I. 15, Exhibit I, pp. 25-26). ALPA claims that equitable relief remains viable because Continental is once again a healthy, operating airline capable of integrating seniority lists if so ordered by an arbitrator.

On April 8, 1991, Arbitrator Kasher held a pre-hearing conference. He invited Continental, Texas Air, and others to file brief statements of position prior to that conference. Continental filed a statement arguing that the Bankruptcy Act automatically stayed all legal proceedings, including the Kasher Arbitration, as of December 3, 1990. Thus, argued Continental, the Kasher arbitration could not proceed without the express permission of U.S. Bankruptcy Judge Helen S. Balick. (Kasher Arbitration ("KA"), op., at 20). Eastern argued that the determination of whether the LPPs had been triggered should be made by the System Board of Adjustment rather than by Arbitrator Kasher, a Section 13 LPP Arbitrator.[3] (KA at 4).

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[3] "Section 13 LPP Arbitrator" refers to an arbitrator appointed pursuant to section 13 of the Allegheny-Mohawk LPPs.

Arbitrator Kasher decided that he had jurisdiction to ascertain whether Eastern and Continental had "merged", and if they had, to determine the appropriate remedies. (KA at 17, 20-21). He found that ALPA's claim did not "meet the standard indicia of a 'grievance'" which would have been submitted to the System Board of Adjustment. (KA at 20). Arbitrator Kasher found that ALPA "does not appear to have alleged, before this Arbitrator, that Eastern violated a specific term or condition in the collective bargaining agreement. . . ." (KA at 20). Therefore, in accordance with Section 13 of the LPPs, Arbitrator Kasher asserted his jurisdiction to hear the LPP claims.

On April 16, 1993, Judge Balick entered an Order confirming Continental's Joint Second Plan of Reorganization, as Modified ("Plan of Reorganization"). The Plan of Reorganization took effect on April 27, 1993. In the Plan of Reorganization, the bankruptcy court permanently enjoined any arbitration involving the LPPs, including the Kasher Arbitration.

An important piece of the Plan of Reorganization was the investment of $450 million dollars into Continental. One of the conditions of that investment was a judicial determination that ALPA and the LPP claimants were not entitled to prospective relief for any breach of the LPPs. Another condition of the investment was an overall limit on administrative claims. (D. I. 15, Exhibit C). When the bankruptcy court confirmed Continental's Plan of Reorganization, it noted that the $450 million investment was "crucial to the feasibility of the [Reorganization] Plan." (D. I. 15, exhibit I).

In confirming the Plan of Reorganization, the bankruptcy court relied on orders it had entered on February 11, 1993, in which the court had found that the LPP claims were, at most, general unsecured prepetition claims which could be fully satisfied without the granting of equitable relief.[4] Neither ALPA

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[4] Continental and ALPA had stipulated that "in making its findings concerning feasibility . . . the Bankruptcy Court may rely and base its findings upon its Order, dated February 11, 1993, regarding ALPA's LPP claims.

nor the LPP Claimants moved to stay the confirmation order. While others did move for a stay, Judge Balick denied those motions. On April 27, 1993, the Plan of Reorganization was substantially consummated with the investment by Air Canada and Air Partners of $450 million, the consensual restructuring of approximately $1.7 billion of secured debt and $5.4 billion of lease obligations, and the commitment of four classes of unsecured creditors to exchange approximately $3 billion in general unsecured claims for stock in a reorganized Continental.

On March 24, 1994, ALPA and Continental settled nearly all litigation, grievances, arbitration, and bankruptcy claims that had previously been brought by ALPA ("Settlement Agreement"). The Settlement Agreement was approved by the bankruptcy court on July 19, 1994. As part of that Settlement Agreement, ALPA agreed to withdraw its appeals with prejudice.[5]

The Settlement Agreement specifically states, however, that ALPA's waiver of its LPP claims has no effect upon "any claims or rights of any pilot who has filed a claim for such in the Delaware Bankruptcy Proceedings and does not participate in this Settlement Agreement." (D. I. 50, item 3, ¶ 8 (B)). The LPP Claimants did file claims in the Delaware bankruptcy proceedings and did not participate in the Settlement Agreement.

II. PROCEDURAL POSTURE

A. Orders

ALPA and the LPP Claimants appeal from four orders issued by the bankruptcy court. The first two orders, issued on February 11, 1993, granted partial summary judgment in favor of Continental. The first Order held that (1) ALPA's LPP claims constitute "claims" within the meaning of the Bankruptcy Code because they "can be satisfied by money damages in the form of back pay and/or front pay;" (2) "the LPP claims are, at best, general unsecured prepetition claims and are dischargeable" because the transactions relied upon by ALPA to prove the

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[5] ALPA has not yet withdrawn its appeals.

merger of Continental and Eastern occurred prior to December 3, 1990; and (3) the LPP claims are not entitled to administrative priority. ALPA and the LPP Claimants appeal from this Order. (Civ. A. 93-177 and 93-178). The second Order of February 11, 1993, restated many of the conclusions of the first Order and provided that the first Order was binding upon the LPP Claimants, in addition to ALPA. ALPA and the LPP Claimants appeal this second Order. (Civ. A. 93-163 and 93-164).

The following issues are presented by the appeals of the February 11, 1993, Orders:

(1) Whether the Bankruptcy Court has the power to determine the appropriate remedy for Continental's breach of the Labor Protective Provisions?

(2) Whether the Bankruptcy Court erred in ruling that Continental's obligation to integrate the former Eastern pilots into the Continental pilot seniority list constitutes a "claim" that is dischargeable pursuant to Section 101(5) of the Bankruptcy Code?

(3) Whether the Bankruptcy Court erred in ruling that no portion of ALPA's claim is entitled to administrative priority?

(D. I. 1).[6]

The third Order, entered on April 16, 1993, confirmed Continental's Plan of Reorganization. The Plan of Reorganization contained a permanent injunction enjoining ALPA and the LPP Claimants from submitting the LPP dispute to arbitration. In addition, the Plan of Reorganization expressly incorporated the February 11, 1993, Orders. Both ALPA (Civ. A. 93-250) and the

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[6] ALPA requests that the court "determine that the bankruptcy court lacked jurisdiction to determine the appropriate remedy for Continental's breach of LPPs because, pursuant to the terms of the LPPs, only an arbitrator can determine the appropriate remedy." (D. I. 9 at 6). In the alternative ALPA argues "that the future employment with seniority that ALPA seeks constitutes a right to equitable relief that cannot be settled as a general unsecured claim." (D. I. 9 at 6).

LPP Claimants (Civ. A. 93-255) appeal from the bankruptcy court's confirmation of the Plan of Reorganization. Because the April 16, 1993, Order incorporates the February 11, 1993, Orders, the appeal of the April 16 Order presents those same issues. In addition, the following questions are raised: (1) whether the bankruptcy court erred by "re-adjudicating and incorporating" prior orders that were on appeal; and (2) whether the bankruptcy court erred in permanently enjoining ALPA and the LPP Claimants from arbitrating the LPP dispute. (Civ. A. 93-255, D. I. 1).

The fourth Order, issued on September 9, 1994, denied the LPP Claimants' motion for an extension of time to appeal the Bankruptcy Court's July 19, 1994, Order which approved ALPA-Continental Settlement Agreement. The bankruptcy court stated in its Order of July 19, 1994, that "[a]ppproximately two-thirds of the pilots have elected to participate in the Settlement, so that the Settlement disposes of the greatest bulk of claims, and greatly reduces the costs of litigation." (Civ. A. 94-496, D. I. 9 at A-79). Furthermore, the court held, "Those who objected [to the settlement] had the clear recourse of refusing to participate in the Settlement and retaining their claims. Approximately a third of the pilots did so." (Civ. A. 94-496, D. I. 9 at A-79). On August 15, 1994, Continental notified this court, and by carbon copy the LPP Claimants, that it intended to file a motion to dismiss the appeal of the LPP Claimants on the grounds that ALPA's settlement of the underlying claims was binding upon them. (Civ. A. 94-496, D. I. 9 at A-82). For the first time, the LPP Claimants had reason to believe that their LPP claims had been settled despite their non-participation in the Settlement Agreement. On August 18, 1994, the LPP Claimants filed a motion to extend the time to file a notice of appeal. The Bankruptcy Court denied this request. The LPP Claimants appeal that denial. (Civ. A. 94-496).

B. Motions

On May 18, 1993, Continental filed a motion to Dismiss the pending Appeals of ALPA and the LPP Claimants as moot ("First Motion to Dismiss as Moot"). In that motion, Continental asserted that because the LPP Claimants and ALPA failed to move to stay the bankruptcy court's confirmation order approving Continental's Plan of Reorganization and because parties who invested in Continental did so in reliance on the February 11 Orders which were incorporated into that confirmation order, the court cannot now grant effective relief to ALPA or the LPP Claimants. As such, Continental argues that the appeals should be dismissed as moot. (D. I. 14).

On September 12, 1994, Continental filed another motion to dismiss the appeals of ALPA and the LPP Claimants as moot.[7] In the brief accompanying that motion Continental argued that ALPA represented the LPP Claimants in the Kasher Arbitration, which was the forum in which the LPP dispute was to be decided. (D. I. 49). ALPA has settled the LPP dispute with Continental. That Settlement Agreement was approved by the bankruptcy court on July 19, 1994. Therefore, argues Continental, ALPA and the LPP Claimants no longer have standing to prosecute the LPP dispute.

First, this court will address Continental's mootness motions. Then, each point of the appeals will be resolved *seriatim*.

III. DISCUSSION

A. Motions

1. First Motion to Dismiss as Moot

The issue presented by this motion is whether it is impossible or inequitable for this court to grant effective relief to the appellants. The United States Supreme Court has held that where "an event occurs while a case is pending on appeal that makes it impossible to grant 'any effectual relief

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[7] This is the motion to which Continental had referred in its letter of August 15, 1994.

whatever' to a prevailing party, then the appeal must be dismissed." *Church of Scientology of Cal. v. United States*, 506 U.S. 9, __ , 113 S. Ct. 447, 449 (1992) (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)). This is a constitutional restriction on the power of an appellate court. A federal court has "no authority" to declare rules of law that cannot affect the matter in issue. *Id.* Numerous Courts of Appeals have applied *Church of Scientology* under the rubric of constitutional mootness. *In re Best Products Co.*, 68 F.3d 26, 30 (2d Cir. 1995); *Brooks v. Georgia State Board of Elections*, 59 F.3d 1114, 1118-19 (11th Cir 1995); *Nasatka v. Delta Scientific Corp.*, 58 F.3d 1578, 1580-81 (Fed. Cir. 1995); *National Football League Players Ass'n*, 56 F.3d 1525, 1528 (D.C. Cir. 1995); *In re Grand Jury Subpoenas Dated December 7 and 8*, 40 F.3d 1096, 1099 (10th Cir. 1994), *cert. denied sub nom. Nakamura v. United States*, 115 S.Ct. 1957 (1995).

The Third Circuit Court of Appeals has held that an appeal will be dismissed as moot when, during the pendency of an appeal, events occur which prevent the appellate court from granting effective relief. *In re Joshua Slocum Ltd.*, 922 F.2d 1081, 1085 (3d Cir. 1990); *In re Highway Truck Drivers & Helpers Local Union No. 107*, 888 F.2d 293, 297 (3d Cir. 1989); *In re Cantwell*, 639 F.2d 1050, 1053 (3d Cir. 1981); *In re Abbotts Dairies of Pennsylvania, Inc.*, 788 F.2d 143, 150 n. 6 (3d Cir. 1986).

In the case of *In re Swedeland Dev. Group, Inc.*, 16 F.3d 552, 559 (3d Cir. 1994), the Court of Appeals discussed "mootness predicated on statutory and prudential considerations." In a footnote, however, the court mentioned that the appeal of one of the orders "may have been moot in the district court on Article III constitutional grounds" because the court could "perceive of no relief which [could] be granted [upon] reversal." *Swedeland Dev. Group*, 16 F.3d at 559 n. 5. The court applied *Church of Scientology*, stating that an appeal is not moot if a court can fashion some form of meaningful relief, even if it is not full relief. The court noted

that its decisions in *Cathcart* and *Cantwell* were in accord with *Church of Scientology. See Swedeland Dev. Group*, 16 F.3d at 560. In a previous decision, the Court of Appeals had ruled that the inability to grant effective relief was a constitutional barrier to the exercise of appellate jurisdiction. *See In re Abbotts Dairies of Pennsylvania, Inc.*, 788 F.2d 143, 150 n.6 (3d Cir. 1986).

The Second Circuit Court of Appeals has delineated constitutional mootness from equitable mootness in the bankruptcy context. The Second Circuit has found that where no effective relief whatsoever can be granted to the prevailing party, the appeal must be dismissed by virtue of the "case or controversy" requirement of Article III of the Constitution. *In re Best Products*, 68 F.3d at 30. Even where relief "could conceivably be fashioned," however, the case should be dismissed as moot if to grant the relief would be inequitable. *Id.* (quoting *In re Chateaugay Corp.*, 988 F.2d 322, 325 (2d Cir. 1993)). In sum, if relief is impossible, the Constitution demands dismissal of the appeal. If relief is possible but inequitable, then equity compels dismissal. *See also In re Spirtos*, 992 F.2d 1004, 1006-07 (9th Cir. 1993) (appellate court must be able to fashion relief that is both effective and equitable); *In re Public Serv. Co. of New Hampshire*, 963 F.2d 469, 473 (lst Cir.), *cert. denied sub nom. Rochman v. Northeast Utils. Serv. Co.*, 113 S.Ct. 304 (1992) (case may be ruled moot if, in light of intervening events, granting the requested relief would be either inequitable or impracticable).

Equitable mootness in bankruptcy proceedings "centers on the important public policy favoring orderly reorganization and settlement of debtor estates by affording finality to the judgments of the bankruptcy court.'" *In re Public Service Co. of New Hampshire*, 963 F.2d 469, 471-72 (lst Cir. 1992) (quoting *In re Revere Copper & Brass, Inc.*, 78 B.R. 17, 23 (S.D.N.Y. 1987)). The doctrine in the bankruptcy context requires the balancing of many factors, including (1) whether

substantial consummation of the bankruptcy plans[8] or a comprehensive change in circumstances has occurred; (2) whether the appellant has obtained a stay pending appeal; and (3) the nature of relief sought by appellant. *In re Combined Metals Reduction Co.*, 557 F.2d 179 (9th Cir. 1977).

In addition to these factors, courts have considered whether the relief requested might have a negative effect on third parties not before the court or would affect the reemergence of the debtor as a revitalized entity. *In re Public Service Co. of New Hampshire*, 963 F.2d 469, 474 (lst Cir. 1992); *In re Club Assocs.*, 956 F.2d 1065, 1069 n.11 (11th Cir 1992); *Matter of Block Shim Dev. Co.-Irving*, 939 F.2d 289, 291 (5th Cir. 1991). In *Miami Center Ltd. Partnership v. Bank of New York*, 838 F.2d 1547, 1555 (11th Cir.), *cert. denied*, 488 U.S. 823 (1988), the court also considered "the passage of time." One bankruptcy court thought the primary consideration to be "the relative fault of the interested parties in creating the resulting unfortunate situation." *In re B. Cohen & Sons Caterers, Inc.*, 147 B.R. 369, 378 (Bankr. E.D.Pa. 1992). In sum, invoking the doctrine of equitable mootness requires some consideration of all of these factors.

The first factor to be considered is whether substantial consummation of the bankruptcy plan or a comprehensive change in circumstances has occurred. Substantial consummation, according to the Bankruptcy Code, means:

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[8] Where the court cannot grant the relief requested without disturbing consummated transactions, a bankruptcy appeal will be dismissed as moot. *In re Delaware and Hudson Ry. Co.*, 129 B.R. 388, 395 (D.Del. 1991) (J. Latchum). The Second Circuit has held that substantial consummation will not moot the appeal if (1) a court can still order some effective relief; (2) such relief will not affect the emergence of the debtor from bankruptcy as a healthy corporate entity; (3) relief would not unravel intricate transactions and create an unmanageable situation for the bankruptcy court; (4) the parties adversely effected have notice of the appeal and an opportunity to participate; and (5) the appellant pursued a stay if the failure to do so created a situation in which it would be inequitable to reverse the order. *In re Chateaugay*, 10 F.3d 944, 952-53 (2d Cir. 1993).

> (A) transfer of all or substantially all of the property proposed by the plan to be transferred; (B) assumption by the debtor or by the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan; and (C) commencement of distribution under the plan.

11 U.S.C.A. § 1101(2). The existence of substantial consummation is not the end of the inquiry, but one step in the determination of whether effective relief can be granted. *In re AOV Indus., Inc.*, 792 F.2d 1140, 1148-49 (D.C. Cir. 1986), *vacated in part on other grounds*, 797 F.2d 1004 (D.C. Cir. 1986). Judge Farnan of this court has already found substantial consummation of Continental's Bankruptcy Plan. *See In re Continental Airlines, Inc.*, Civ. A. 93-195, D. I. 55 (D.Del. December 30, 1993) (memorandum opinion), *rehearing denied*, Civ. A. 93-195, D. I. 70 (D.Del. September 1994). This court agrees that the Plan of Reorganization has been substantially consummated.

The second inquiry is whether the appellant sought a stay of the order from which it appeals. An appellant has no obligation to seek a stay pending appeal. *Matter of T & H Diner, Inc.*, 108 B.R. 448, 451-52 (D.N.J. 1989). Furthermore, the failure to obtain a stay pending appeal does not alone moot the appeal when effective relief remains available. *In re Public Service Co. of New Hampshire*, 963 F.2d 469, 473 (lst Cir. 1992); *In re Club Assocs.*, 956 F.2d 1065, 1070 (11th Cir 1992); *United Merchants*, 138 B.R. at 429. However, there are "a myriad of circumstances" in which obtaining a stay is necessary to preserve a party's position and avoid the progression of events and circumstances that might moot the appeal. *In re Highway Truck Drivers & Helpers Local 107*, 888 F.2d 293, 298 (3d Cir. 1989). Here, neither ALPA nor the LPP Claimants sought a stay of the orders from which they appeal. The Plan of Reorganization went forward and was substantially consummated.

A third aspect to the equitable balancing of interests concerns the relief requested by the parties. The appellants request several different remedies. ALPA and the LPP Claimants ask this court to find that the bankruptcy court had no jurisdiction to determine that their claims for equitable relief could be satisfied by money damages. The appellants also seek a ruling that any damages flowing from the LPP claims are entitled to administrative priority as wages, at least to the extent that those damages represent back and front pay that would have been earned while Continental was in bankruptcy. In essence, the LPP claimants want to take their claims to an arbitrator who would be empowered to grant both eguitable and monetary relief, and then to recover any money damages that reflect post-petition back and front pay as an administrative priority.[9] This full measure of relief would jeopardize the Plan of Reorganization and could destroy the substantial post-bankruptcy progress of Continental.

The fourth step of the equity analysis requires the court to consider the potential effect of the requested relief on third parties not before the court. The relevant third parties are those who invested in Continental in reliance on the orders from which ALPA and the LPP Claimants appeal. The prevailing party may treat a bankruptcy court order as final, whether or not an appeal is pending. *T & H Diner*, 108 B.R. at 451-52. Thus, Continental and its investors were not wrong to rely on the orders now on appeal. In the case of *In re Holywell Corp.*, 901 F.2d 931, 933 (11th Cir 1990), *cert. denied*, *Miami Center Ltd Partnership v. Bank of New York*, 498 U.S. 1041 (1991), a bank purchased property in reliance on the bankruptcy court's determination of an interest rate. The court of appeals refused to tamper with the interest rate, because it "would strike at a crucial element of the reorganization plan" on which the investor had relied. *Id.* at 934. Yet, investors

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[9] Because the LPP Claimants are not parties to the Kasher Arbitration, which has been settled, the LPP Claimants would essentially be starting anew in their efforts to integrate the seniority lists.

should consider the risk that a bankruptcy order will be reversed:

> We conclude that all parties proceeded to implement the plan with knowledge that the district court's determination was subject to reversal upon appeal. Thus, although challenging the plan or seeking a stay pending appeal was preferable, tenant's failure to do so does not render this appeal moot.

In re Flagstaff Realty Assocs., 60 F. 3d 1031, 1036 (3d Cir. 1995).

In the case of *In re Information Dialogues. Inc.*, 662 F.2d 475, 476-77 (8th Cir. 1981), the Eighth Circuit recognized the tension between providing appropriate appellate review of bankruptcy court orders and allowing reorganizations to go forward in reliance on those orders. *See also, Club Assocs.*, 956 F.2d at 1065 (test for mootness balances "equitable considerations of finality and good faith reliance on a judgment" against "the right of a party to seek review of a bankruptcy court order"). The court in *Information Dialogues* held that where substantial elements of the reorganization plan have been implemented, where effective relief may not be able to be granted, and where the appellant has failed to request a stay of the confirmation order, the equities favor dismissal. *Id.*

Another important consideration is whether the relief requested would affect the re-emergence of the debtor as a revitalized entity. Continental has emerged from bankruptcy. The airline is doing well. Granting the requested relief could put Continental back into bankruptcy, jeopardizing the successes of the past several years.

A final consideration is whether the passage of time would make any reversal of the bankruptcy court inequitable. The orders considered in this appeal were entered well over two years ago. Continental has relied on those orders in its reorganization. Outside investors have relied on those orders in deciding to invest in Continental. In bankruptcy

proceedings the passage of time often brings changed circumstances. Having neglected to move for a stay, ALPA and the LPP Claimants cannot avoid the consequences: a substantially consummated Bankruptcy Plan built upon the reliance of third party investors.

When determining whether an appeal has been rendered moot, the district court must scrutinize each individual claim to determine whether effective relief may be granted. *Matter of Andrucetti*, 975 F.2d 413, 418 (7th Cir. 1992); *In re AOV Indus., Inc.*, 792 F.2d 1140, 1149 (D.C.Cir. 1986). Hence, an evaluation of each of the issues on appeal follows.

The administrative priority claim is dismissed for mootness.[10] The $450 million investment was conditioned upon an overall limit on administrative claims and upon a judicial determination that ALPA and the LPP Claimants were not entitled to equitable relief. That investment was, in the words of the bankruptcy court, "crucial to the feasibility of the [Reorganization] Plan."[11] To reverse the bankruptcy court on this matter could jeopardize the Plan of Reorganization and Continental's successful emergence from bankruptcy. Any relief this court might be able to fashion would be inequitable to Continental and its third party investors.

The challenge to the bankruptcy court's jurisdiction will not be dismissed as moot. An objection to subject matter

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[10] To the extent that the administrative priority claim is later found not to have been moot, this court holds that the appellants' claims are not entitled to administrative priority for the reasons expressed by Judge Latchum in *In re Continental Airlines, Inc.*, 148 B.R. 207 (D.Del. 1992).

[11] This fact distinguishes this case from *In re AppleTree Markets*, 1993 U.S. Dist LEXIS 8411 (S.D.Tex. May 24, 1993). In that case, the court found that "an explanation of how the various transactions consummated in reliance on the confirmed Plan or the survival of AppleTree as a viable business would be affected by a successful appeal of the order rejecting the CBAs" was "[n]otably absent" from the debtor's motion. *Id.* at *7. In the present case, a successful appeal on the issue of administrative priority would demolish a cornerstone of the Investment Agreement.

jurisdiction may be raised at any time. *Booth v. United States*, 990 F.2d 617, 620 (Fed. Cir. 1993); *Huddleston v. Nelson Bunker Hunt Trust Estate*, 109 B.R. 197, 201 (N.D. Tex. 1989), *aff'd*, 935 F.2d 1290 (5th Cir. 1991). If the bankruptcy court had no jurisdiction, then its order is void. *See Williams v. Life Sav. and Loan*, 802 F.2d 1200 (10th Cir. 1986). Therefore, this court must determine whether the bankruptcy court had jurisdiction to determine that the equitable relief requested could be satisfied by a money judgment.

The question of whether the equitable right to seniority list integration gives rise to a right of payment, making it a claim in bankruptcy, is not moot. While one condition of the Settlement Agreement was a judicial determination that the appellants were not entitled to equitable relief, the conclusion that equitable relief may be granted would not give rise to the same draconian consequences as would a finding that the LPP claims are entitled to administrative priority. If this court were to find that the right to seniority list integration did not give rise to a right of payment, then the arbitrator would be free to order the fair and equitable integration of seniority lists. In making his or her decision, the arbitrator could take into account Continental's financial condition so as to prevent a slide back into bankruptcy.[12] Because an arbitrator could structure the integration of seniority lists in a way that would not unduly risk Continental's continued progress or the investments of third parties, this court will decide whether the asserted right to seniority list integration constitutes a claim in bankruptcy.

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[12] Continental argues that a "forced 'date of hire' seniority integration would entail up to $100 million in retraining costs" and the "displacement of thousands of Continental pilots." The court notes that this argument was made prior to the Settlement Agreement. The present consequences of seniority list integration would certainly be less drastic. In addition, the arbitrator is not required to integrate the seniority lists strictly by "date of hire." An arbitrator would be charged with integrating the seniority lists in a fair and equitable manner. If a strict "date of hire" integration scheme would be inequitable, an arbitrator would not order it.

The other issues raised on appeal are not moot. If the bankruptcy court erred by incorporating the February orders into the April order, this court would not be required to strike down the entire Plan of Reorganization, but could fashion more limited relief. In addition, if the bankruptcy court erroneously granted the permanent injunction against arbitration, the remedy would be to vacate the injunction and allow arbitration to go forward. In light of the arbitrator's duty to achieve a fair and equitable result, the court feels confident that an arbitrator could fulfill that duty without jeopardizing the reorganization. Finally, Continental's First Motion to Dismiss as Moot does not encompass the appeal of the LPP Claimants for additional time to appeal the approval of the Settlement Agreement.

In sum, the claim for administrative priority for back and front pay which arose after Continental's petition for bankruptcy was filed is moot. All other claims survive Continental's First Motion to Dismiss as Moot.

2. Second Motion to Dismiss as Moot

The issue raised in the Second Motion to Dismiss as Moot is whether the Settlement Agreement signed by ALPA moots the LPP dispute, thereby mooting the appeal of both ALPA[13] and the LPP Claimants. Continental argues that it has settled with the only party capable of asserting the right to seniority list integration, so the LPP dispute is now moot. While the parties dispute whether ALPA represents the LPP Claimants, representation is irrelevant.[14] The issue is whether

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[13] Continental does not seek to enforce the promise made by ALPA to withdraw its appeal. This court sitting as an appellate court, will not do so *sua sponte*.

[14] If ALPA was not the collective bargaining representative of the LPP Claimants, then it could not settle the claims of the LPP Claimants. If ALPA was the collective bargaining representative of the LPP Claimants, then while ALPA had the power to settle the claims of the LPP Claimants, the language of the Settlement Agreement makes clear that ALPA did not settle those claims.

individual pilots can assert a right to seniority list integration under the collective bargaining agreement, and if so, whether the Settlement Agreement disposes of those rights.

The reply brief of Continental demonstrates that the Settlement Agreement had no effect at all on the rights of the LPP Claimants:

> The settlement was plainly intended to leave individual pilots in the same position they were prior to the settlement -- no better, no worse.

(D. I. 55 at 2). The language of the Settlement Agreement, and the briefs of the other parties, support this statement. Thus, Continental cannot seriously claim that the settlement mooted the appeals. Rather, Continental asserts that the seniority integration rights were group rights that could only be asserted by ALPA, and the individual LPP Claimants never had standing to bring the LPP claims.[15]

The substantive issue is, as previously noted, whether the LPP Claimants have individual rights to seniority integration under the LPPs. Before reaching that issue, however, this court must decide that it, rather than an arbitrator, has the power to make that determination. This depends upon whether seniority is a "major dispute" or a "minor dispute."

As stated by the Supreme Court, "major disputes seek to create contractual rights, minor disputes to enforce them." *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 491 U.S. 299, 302 (1989). A minor dispute "relates either to the meaning or proper application of a particular provision. . . " *Id.* at 303 (quoting *Elgin J. & E.R. Co. v. Burley*, 325 U.S. 711, 723 (1945)); *see also United Transp. Union v. Conemaugh & Black Lick R.R. Co.*, 894 F.2d 623, 628 (3d Cir. 1990) ("minor dispute concerns the meaning and application of provisions of the negotiated agreement"). The burden of showing that a

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[15] Continental does not claim that the LPP Claimants have no standing on appeal. Because the second February 1993 Order specifically bound the LPP Claimants, they have standing to appeal that order.

dispute is minor is "relatively light." *General Comm. of Adjustment, United Transp. Union, Western Maryland Ry. Co. v. CSX R.R. Co.*, 893 F.2d 584, 591 (3d Cir. 1990). When in doubt, courts construe the dispute as minor. *Id.*; *Air Line Pilots Ass'n v. Eastern Air Lines*, 869 F.2d 1518, 1521-22 (D.C. Cir. 1989); *Chicago & North Western Transp. Co. v. International Bhd. of Elec. Workers, Local Union No. 214*, 829 F.2d 1424, 1428-29 (7th Cir. 1987).

The LPP dispute is a minor dispute. The controversy involves whether the Eastern and Continental have "merged" within the meaning of the LPPs which are part of the collective bargaining agreement. A district court's role in minor disputes is limited to protecting the jurisdiction of the arbitration board. *Chicago & North Western Transp. Co. v. International Bhd. of Elec. Workers, Local union No. 214*, 829 F.2d 1424, 1428 (7th Cir. 1987). The federal court cannot consider the merits of the underlying dispute or the remedy that might be appropriate. *General Comm. of Adjustment, United Transp. Union v. CSX Railroad Co.*, 893 F.2d at 592-93; *Air Line Pilots Ass'n v. Eastern Air Lines*, 869 F.2d 1518, 1521 (D.C.Cir. 1989).

The issue of whether the LPP Claimants have individual rights to seniority integration under the LPPs is not properly before this federal district court.[16] Therefore, this court will not dismiss the claims of the LPP claimants based on their alleged lack of standing to assert the contractual right to seniority integration.[17]

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[16] Jurisdiction may lie with an adjustment board in accordance with its normal jurisdiction over minor disputes, or jurisdiction may lie with a Section 13 LPP Arbitrator as provided by the LPPs. The issue of which of those two fora is appropriate is not properly raised in this appeal.

[17] There is administrative precedent for the proposition that the LPP Claimants may individually assert their seniority rights. See, e.g., *In re North Central-Southern Merger Case*, 82 C.A.B. 1, 1979 WL 21508, *63, Orders 79-6-7, 79-6-8 (May 15, 1979) ("labor protective provisions represent a formula for protecting individual employees" from hardships

B. Standard of Review

The bankruptcy court's conclusions of law are subject to *de novo* review. *Meridian v. Alten*, 958 F.2d 1226, 1229 (3d Cir. 1992); *Matter of Spencer*, 115 B.R. 471, 473 (D.Del. 1990). The factual findings of the bankruptcy court may not be set aside unless clearly erroneous. Bankruptcy Rule 8013; *Landon v. Hunt*, 977 F.2d 829, 830 (3d Cir. 1992).

C. Merits of the Appeals

1. Jurisdiction of Bankruptcy Court

ALPA and the LPP Claimants argue that the Bankruptcy Court did not have the power to determine that the LPP claims could be satisfied by monetary awards rather than by specific performance directing the equitable integration of the Eastern and Continental seniority lists. The appellants claim that the collective bargaining agreement provided for such decisions to be made by an arbitrator from the National Mediation Board.

As an initial matter it must be noted that the Bankruptcy Court did not hold that ALPA and the LPP Claimants were not entitled to equitable relief. Rather, the court held that any right to equitable relief could be reduced to money damages as an alternative to specific performance. Contrary to ALPA's assertions, the Bankruptcy Court did not encroach upon the jurisdiction of the arbitrator to determine an appropriate remedy for a breach of the LPPs. The bankruptcy court simply decided that any equitable remedy could be reduced to a right of payment, thereby making the right to seniority list integration a "claim" in bankruptcy.

This was within the jurisdiction of the Bankruptcy Court. The determination of whether the right to the integration of seniority lists is a "claim" under 11 U.S.C. § 101(5)(B) is a "core" bankruptcy matter. *See* 28 U.S.C. § 1334; 28 U.S.C. § 157; *In re Leco Enters., Inc.*, 144 B.R. 244, 248 (S.D.N.Y.

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involved with merger. "The spouses as individuals are clearly entitled to the benefit of the labor protective conditions").

1992) (cases arising under Title 11 are "at the core of the jurisdiction of the bankruptcy courts"). It arises directly under the Bankruptcy Code. There can be no question, therefore, that the Bankruptcy Court properly exercised its jurisdiction.

2. "Claim" Under Section 101(5)

Having decided that the Bankruptcy Court properly exercised its jurisdiction to determine that the alleged right to seniority list integration was a claim under 11 U.S.C. § 101(5), the court must now determine whether the Bankruptcy Court's decision on that issue was correct.

The United States Code defines the term "claim" in bankruptcy, in relevant part, as a "right to an equitable remedy for breach of performance if such breach gives rise to a right of payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured or unsecured." 11 U.S.C. § 101(5)(B). This language has been interpreted to be the "broadest available definition" of that term. *Johnson v. Home State Bank*, 501 U.S. 78, 82 (1991); *Matter of Udell*, 18 F.3d 403, 406 (7th Cir. 1994). The essential question is whether the right to the integration of seniority lists gives rise to a "right of payment." The Supreme Court has stated that a "right to payment" is nothing more than an enforceable obligation. *Pennsylvania Dep't of Public Welfare v. Davenport*, 495 U.S. 552, 559 (1989) (holding that the obligation to make restitution payments for welfare fraud falls within definition of claim).[18]

The major Supreme Court case elucidating the term "right to payment" is *Ohio v. Kovacs*, 469 U.S. 274 (1985). In that case the state sought "money to defray [environmental] cleanup costs" in lieu of the enforcement of an injunction ordering the cleanup. *Id.* at 279, 283. The court found that the

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[18] While the result of *Davenport* was overruled by the Criminal Victims Protection Act of 1990, the rationale of the decision remains unscathed. *Johnson*, 501 U.S. at 83-84 n.4.

injunction gave rise to a right to payment. *Id.* at 283. Here, ALPA and the LPP Claimants want more than just money. They want the actual equitable integration of the seniority lists, as well as back pay and front pay during a period of retraining.

Courts have taken several divergent approaches in the interpretation of *Kovacs*.[19] One court has interpreted *Kovacs* to mean that "[i]f an expenditure of money is required to perform the obligation, then the affirmative duty gives rise to a 'claim'. . . ." *In re May* 141 B.R. 940, 943 (Bankr. S.D.Ohio 1992).[20] The Fifth Circuit has explained that the definition of "claim" is "designed to cause the liquidation of contingent claims for money damages that are alternatives to equitable remedies." *Matter of Davis*, 3 F.3d 113, 116 (5th Cir. 1993). One example of a right to an equitable remedy that gives rise to a right to payment is a right to specific performance with an alternative right to damages. *See Kovacs*, 469 U.S. at 280 (quoting legislative history); *In re Perry*, 131 B.R. 763, 766 (Bankr. D. Mass. 1991).

The Seventh Circuit Court of Appeals found that in addition to when damages are an "alternative" to the right to an equitable remedy, the right to payment "must at least arise 'with respect to' the equitable remedy, not apart from it." *Matter of Udell*, 18 F. 3d at 407. According to the Seventh Circuit, the focus is on whether equitable and monetary

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[19] At least one court has ignored *Kovacs*. *See In re Blue Diamond Coal Co.*, 147 B.R. 720 (Bankr. E.D.Tenn. 1992), *aff'd*, 160 B.R. 574 (E.D.Tenn. 1993). There the court held that "[b]ecause the Union may sue to enforce the terms of the Agreement outside of bankruptcy, it has a 'right to payment' sufficient to support a claim in bankruptcy." Clearly, this is not the appropriate test.

[20] This is an overy simplistic reading of *Kovacs*. In *Kovacs*, the Court emphasized that Oho was not attempting to get *Kovacs* to personally clean up the property, but was simply seeking money for the remediation. Such a distinction would be irrelevant under the rationale of *May*, because *Kovacs* would have had to expend money either to personally clean up the property or to pay the state.

remedies address "entirely separate remedial concerns." *Id.* at 409. If so, then the equitable remedy does not give rise to the monetary remedy. *Id.* Finding that a stipulated damages clause and an injunction requiring Mr. Udell not to compete with his former employer gave rise to separate remedial concerns with no "derivative relationship," the court held that the injunction was not a claim. *Id.* at 409.

The Third Circuit addressed the interpretation of "right to payment" in the case of *In re Torwico Elecs., Inc.*, 8 F.3d 146, 150 (3d Cir. 1993), *cert. denied sub nom. Torwico Elecs., Inc. v. New Jersey Dep't of Environmental Protection and Energy*, 114 S. Ct. 1576 (1994).[21] The Court of Appeals rested its decision upon the distinction between environmental enforcement efforts that can be fulfilled through the payment of money and those that cannot. The court explained that a prospective obligation to clean up hazardous waste did not constitute a claim in bankruptcy where the debtor "had no option to pay for the right to allow its wastes to continue to seep into the environment." *Id.* at 151 n. 6; *see also*, *In re Chateaugay*, 944 F.2d 997, 1009 (2d Cir. 1991) (to the extent that CERCLA affords a right to payment in lieu of an order directed solely at cleanup, such an order is a claim); *United States v. Hubler*, 117 B.R. 160, 165 (W.D.Pa. 1990), *aff'd*, 928 F.2d 1131 (3d Cir. 1991) (plaintiff did not and cannot convert defendants' obligations into monetary liability so they are not "claims"). The equitable right to environmental remediation could not be exchanged for a right of monetary payment.

The relevant question here is whether monetary damages are a viable alternative to the actual integration of the Eastern and Continental seniority lists. If Continental's obligation to integrate seniority lists can be converted into a monetary liability (i.e. damages for the alleged breach of the collective bargaining

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[21] In that decision, the Third Circuit marginalized, relative to the issues in this appeal, its decision in *Penn Terra Ltd. v. Department of Environmental Resources*, 733 F.2d 267 (3d Cir. 1984). The court distinguished *Penn Terra* as addressing the automatic stay provisions of § 362 rather than the definition of claim under § 101(5). *See Torwico*, 8 F.3d at 150 n. 2.

agreement rather than specific performance), then it is a "claim." All appropriate remedies are available to enforce violations of the Railway Labor Act. *CSX Transp. Inc. v. Marquar*, 980 F.2d 359, 365 (6th Cir. 1992). Indeed, money damages for violations of the Railway Labor Act were regarded as a proper judicial remedy prior to the remedy of reinstatement. *See Brady v. Trans World Airlines, Inc.*, 401 F.2d 87, 102-03 (3d Cir. 1968), *cert. denied*, 393 U.S. 1048 (1969). While this case involves not so much a violation of the Railway Labor Act as a breach of a collective bargaining agreement under the Railway Labor Act, a monetary remedy is not precluded

Courts generally view front pay as an "alternative" to reinstatement. *See Goss v. Exxon Office Sys. Co.*, 747 F.2d 885, 890 (3d Cir. 1984) ("future lost earnings in Title VII cases is an alternative to the traditional equitable remedy of reinstatement"); *see also, Seymour v. Olin Corp.*, 666 F.2d 202, 211 (5th Cir. 1982) (prospective damages may be granted if reinstatement is impractical); *Soto Segarra v. Sea-Land Serv., Inc.*, 581 F.2d 291, 297 (lst Cir. 1978) (same); *de Arroyo v. Sindicato De Trabajadores Packing, AFL-CIO*, 425 F.2d 281, 292 (lst cir. 1970), *cert. denied sub nom. Puerto Rico Telephone Co. v. de Arroyo*, 400 U.S. 877 (1970) (same).

There is no persuasive reason to distinguish the equitable remedy of seniority list integration from the equitable remedy of reinstatement. A wrongful denial of seniority in a merged airline is wholly analogous to wrongful discharge. Both deprive employees of jobs that rightfully belong to them. Front pay can be an alternative remedy for both. In sum, this court holds that front pay is an alternative remedy to seniority list integration.[22] Therefore, the Bankruptcy Court did not err when it held that the right to seniority

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[22] Furthermore, the right to damages arises "in respect to" the integration of seniority lists. *See Matter of Udell*, 18 F.3d at 407. If there is no right to the integration of seniority lists, then there is no right to back pay and limited front pay. The money damages are "derivative" of the equitable remedy.

list integration gave rise to a right of payment and, as such, is a "claim" within the meaning of 11 U.S.C. §101(5)(B).

3. Incorporating Appealed Orders Into New Order

ALPA questions whether the incorporation of the February 11 Orders into the April 16 Order constitutes a violation of res judicata. ALPA argues that the February 11 Orders were final judgments on the merits of the LPP claims, so that res judicata barred any subsequent action involving the same claim, "prohibiting either Continental or ALPA from relitigating the underlying merits before the bankruptcy court." Thus, ALPA reasons that no new judgment on the same matter could issue from the bankruptcy court. (D. I. 30 at 16-20).

As a factual matter, the bankruptcy court did not relitigate the underlying merits of the February 11 Orders. It simply restated and incorporated its prior findings. Regarding ALPA's legal contentions, they do not concern res judicata, i.e. claim preclusion, because the February 11 Orders and April 16 Order were issued in the same case. Law of the case is the applicable doctrine. *Hull v. Freeman*, 991 F.2d 86, 90 (3d Cir. 1993); *In re Justice Oaks II, Ltd.*, 898 F.2d 1544, 1549 n. 3 (11th Cir), *cert. denied* 498 U.S. 959 (1990). The law of the case doctrine is applied subject to the court's discretion. *Coca-Cola Bottling Co. of Shreveport v. Coca-Cola Co.*, 988 F.2d 414, 429 (3d Cir. 1993), *cert. denied*, 114 S.Ct. 289 (1993). It does not limit the tribunal's power. *Arizona v. California*, 460 U.S. 605, 618 (1983). Law of the case provides that when a court decides a rule of law, that rule governs the remainder of the litigation. *Matter of Resyn Corp.*, 945 F.2d 1279, 1281 (3d Cir. 1991).[23]

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[23] There are three primary exceptions to this rule: (1) when the right to move for reconsideration would be effectively denied; (2) when new evidence is available; and (3) when there has been a supervening rule of law. *Schultz v. Onan* Corp., 737 F.2d 339, 345 (3d Cir. 1984) (quoting *Hayman Cash Register Co. v. Sarokin*, 669 F.2d 162, 169-70 (3d Cir. 1982)).

The February 11, 1993, Orders were law of the case on April 16, 1993. Judge Balick properly relied on them in deciding whether the Plan of Reorganization was feasible. ALPA attempts to distinguish the Bankruptcy Court's reliance on the Orders, to which ALPA does not object, with the actual incorporation of the prior Orders, to which ALPA strenuously objects. ALPA has submitted neither precedent nor persuasive argument to support this distinction. This court can find no basis for holding that the bankruptcy court exceeded its power by incorporating previously rendered, relevant Orders into a subsequent Order.

4. Permanent Injunction

ALPA argues that the permanent injunction prohibiting the future arbitration of the LPP claims violated Fed.R.Civ.P. 65(d) and 11 U.S.C. § 1113.

On April 16, 1993, Judge Balick confirmed the Plan of Reorganization. (D. I. 31 at A-712). The Plan of Reorganization contained a permanent injunction in Section 12.19. (D. I. 31 at A-442). Basically, the injunction prohibited ALPA and the LPP Claimants from commencing or continuing an arbitration or other proceeding outside the bankruptcy court to determine whether Continental is liable for monetary or equitable relief for its failure to integrate the seniority lists.

Rule 65(d) of the Federal Rules of Civil Procedure provides the requisite form and scope of injunctions issued by federal courts:

> Every order granting an injunction . . . shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; . . .

This Rule is made applicable to the Bankruptcy Court by Bankruptcy Rule 7065 which provides that Fed.R.Civ.P. 65(d) applies to adversary proceedings, excepting applications for temporary restraining orders or preliminary injunctions.

Because the injunction at issue is permanent, not preliminary or temporary, Fed.R.Civ.P. 65(d) applies. The question at issue is whether the Order granting the permanent injunction (1) adequately sets forth the reasons for its issuance and (2) describes the acts restrained without reference to any other document, i.e. the Plan of Reorganization.

Continental asserts that paragraphs 32 and 33 in the April 16, 1993, Order confirming the Plan of Reorganization, as well as the incorporated February 11 Orders, adequately set forth the reasons for the injunction. In those paragraphs of the April 16 Order, the Bankruptcy Court explained that Continental had requested the court "to adjudicate the priority of the Eastern Claims and the extent to which, if any, the claimants thereon are entitled to specific performance or other injunctive, equitable or other prospective relief. . . ."[24] The court incorporated its February 11, 1993, Orders which were the result of the requested adjudication. The court further found that if the claims were "ultimately found to be valid" they would give rise to a right of payment which made them dischargeable "claims." The court did not explain why the court was prohibiting an arbitrator or other tribunal from determining whether those claims were valid. The court gave no reasons for its adoption of Section 12.19 of the Plan of Reorganization titled "Injunction Relating to Eastern Claims."

In addition, the terms of the Order itself do not explain that no arbitrator or court, other than the Bankruptcy Court, may determine whether the LPP claims actually were valid. In fact, if one were to read the Order, without reference to the Plan of Reorganization, there is absolutely no notice of an injunction as described in Section 12.19 of the Plan of Reorganization. Even if the parties were on notice of the language of the Plan of Reorganization (and certainly they were), without a separate court document setting forth that

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[24] The Bankruptcy Court was not requested to determine the merits of the LPP claims or the extent to which ALPA and the LPP Claimants were entitled to monetary remedies.

which is prohibited, an injunction is not effective. *See Bates v. Johnson*, 901 F.2d 1424, 1428 (7th Cir. 1990) ("When a judge does not record an injunction . . . on a separate document, the defendant is under no judicial compulsion"); *Seattle-First Nat'l Bank v. Manges*, 900 F.2d 795, 800 (5th Cir. 1990) ("although reference to the magistrate's findings and recommendation and to the TRO clearly would give . . . specific guidance as to the prohibited behavior, the order fails to comply with Rule 65(d)); *Thomas v. Brock*, 810 F.2d 448, 450 (4th Cir. 1987) (striking section of injunction that refers to findings of fact and conclusions of law issued the same day).[25]

In sum there is neither a statement of reasons for the issuance of an injunction as described in Section 12.19 of the Plan of Reorganization, nor is there a description within the Order of the acts purportedly restrained by that section. An injunction that fails to meet the requirements of Rule 65(d) will not withstand appellate scrutiny. *Diapulse Corp. of America v. Carba, Ltd.*, 626 F.2d 1108, 1111 (2d Cir. 1980). The injunction provided in Section 12.19 of the Plan of Reorganization is ineffective.

The confirmation Order also restates, with certain modifications, 11 U.S.C. § 524. This statutory injunction applies whether or not it is included in a bankruptcy court's Order. Therefore, the statutory injunction survives. However, the specific injunction regarding ALPA and the LPP

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[25] This court specifically rejects the reasoning of the Ninth Circuit Court of Appeals in *Davis v. City and County of San Francisco*, 890 F.2d 1438, 1450-51 (9th Cir. 1989), *cert. denied sub nom. San Francisco Fire Fighters Local 798 v. City and County of San Francisco*, 498 U.S. 897 (1990). In that case, the district court had incorporated fire department rules ("sections of the SFFD General Order") into an injunction. The Court of Appeals found it "unlikely" that the officers enjoined "could argue they were unaware of these rules." *Id.* at 1450. Because the "primary purpose of Rule 65(d) is to assure adequate notice to parties," the court declined to reverse the injunction. This argument impermissibly neglects the plain meaning of the rule which requires specificity without reference to another document.

Claimants included in Section 12.19 of the Plan of Reorganization fails to meet the requirements of Fed.R.Civ.P. 65(d) and is invalid.

ALPA also argues that 11 U.S.C. § 1113 protects ALPA's contractual right under the LPPs to arbitrate the issue of seniority list integration. Section 1113 provides a procedure for a debtor to assume or reject a collective bargaining agreement. For purposes of the motion for summary judgment from which these appeals were taken, counsel for Continental assumed that Continental was bound by and breached the LPPs. The LPPs were included in the collective bargaining agreement. Therefore, counsel for Continental assumed that Continental was bound by and breached a section of the Eastern-ALPA collective bargaining agreement.

Continental argues that § 1113 applies only when there is a collective bargaining agreement and an ongoing collective bargaining relationship. (D. I. 35 at 21). Continental asserts that ALPA has conceded in the past that "the LPP Claims do not involve a collective bargaining agreement, a bargaining relationship, or the imposition of the 'terms and conditions' of the Eastern-ALPA collective bargaining agreement on Continental." (D. I. 35 at 22). This wholly misstates ALPA's contentions. The LPP claims do involve a collective bargaining agreement. The Eastern-ALPA collective bargaining agreement has been interpreted to include the LPPs. ALPA does not claim that the Eastern-ALPA collective bargaining agreement is applicable to the relationship between Continental and the Continental pilots.[26] Rather, ALPA contends that as the carrier with whom Eastern allegedly merged, Continental has a duty to integrate its pilot seniority list with that of Eastern. There is at least some precedent for this argument. *See National Airlines Acquisition,*

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[26] As a result, Continental's argument that bargaining with ALPA over seniority list integration would be "impossible, and even unlawful" is not well taken.

Arbitration, 95 C.A.B. 584, 1982 WL 35318 at *1 (April 15, 1982) ("pursuant to section 3, the surviving carrier of an acquisition or merger and the effected employees . . . are responsible for integrating seniority lists").

Assuming that Continental had this duty, as Continental assumed below, the question is whether the rejection of this duty must be achieved through the provisions of 11 U.S.C. § 1113. It is undisputed that Continental's alleged duties to integrate seniority lists and to arbitrate the dispute if bargaining was unsuccessful arise from the LPPs. It is also undisputed that the LPPs have been interpreted to be a part of the Eastern-ALPA collective bargaining agreement. To the extent that Continental seeks to abrogate its responsibilities under the collective bargaining agreement, it must do so in accordance with the procedures of the Bankruptcy Code, specifically § 1113.

Continental argues, however, that even if § 1113 does apply to the current controversy (and it does), §1113 cannot be interpreted as a partial implied repeal of the "provisions of the Code empowering a bankruptcy court to rule on the status of the claims against a debtor."[27] Continental's argument is not accepted. To the extent that provisions of the Bankruptcy Code conflict with §1113, the plain language of §1113 controls:

> No provision of this title shall be construed to permit a trustee[28] to unilaterally terminate or alter any provisions of a collective bargaining agreement prior to compliance with the provisions of this section.

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[27] Because Continental does not identify the statutory provisions allegedly in jeopardy of implied partial repeal, it is exceedingly difficult to evaluate its arguments.

[28] The term "trustee" as used in §1113(f) includes a debtor in possession. *See* 11 U.S.C. § 1113 (b) (1) ("hereinafter in this section 'trustee' shall include a debtor in possession").

11 U.S.C. § 1113(f). "Subsection 1113(f) evinces an intent that other provisions of the Bankruptcy Code are inoperable to the extent that they allow a debtor to bypass the requirements of § 1113." *In re Ionosphere Clubs, Inc.*, 922 F.2d 984, 989 (2d Cir. 1990). Because Continental's alleged duties to integrate seniority lists upon merger and to arbitrate disputes about seniority integration arise from the collective bargaining agreement and because the collective bargaining agreement has not been rejected in accordance with the provisions of § 1113, those obligations remain intact.

Having decided that Continental has a duty to arbitrate the LPP dispute, under the assumption that Continental was bound by the LPP provisions, the question becomes whether the Bankruptcy Court could properly enjoin that arbitration.[29] The case of *In re Ionosphere, Inc.*, 922 F.2d 984 (2d Cir. 1990) is instructive. That case involved the same LPPs at issue in the present case. The Second Circuit found that

> adjudication of this dispute in the bankruptcy court would nullify effectively the arbitration clause in the collective bargaining agreement and would substitute the court's judgment for that of the arbitrator.
>
> The collective bargaining agreement expressly provides for arbitration as the method of dispute resolution.

Id. at 992. The bankruptcy court does have jurisdiction to decide the merits of the LPP claims. *See* 28 U.S.C. § 157. Yet, exercise of that jurisdiction would abrogate the provision of the collective bargaining agreement that mandated arbitration. Therefore, the bankruptcy court should have allowed an arbitrator to determine the merits of the LPP claims against

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[29] This court has already found that the Bankruptcy Court did not effectively enjoin the arbitration because the injunction did not comply with Fed.R.Civ.P. 65(d). The court is now considering whether upon remand the Bankruptcy Court could properly enter an injunction prohibiting arbitration of the LPP dispute.

Continental.[30] This in no way restricts the bankruptcy court's authority to determine the priority of those claims. Any arbitration award would be, in accordance with the bankruptcy court's determination, a general unsecured pre-petition claim.[31]

The appropriate remedy under these circumstances is to vacate the injunction, which this court hereby orders. *See Newark Stereotypers' Union No. 18 v. Newark Morning Ledger Co.*, 353 F.2d 510 (3d Cir. 1965) (vacating injunction and remanding to district court for proceedings consistent with opinion); *Mayflower Indus. v Thor Corp.*, 182 F.2d 800, 801 (3d Cir. 1950) (dissolving injunction); *Alberti v. Cruise*, 383 F.2d 268, 272 (4th Cir. 1967) (remanding to district court with directions to vacate injunction); *see also, Hartford-Empire Co. v. United States*, 323 U.S. 386, 410, *supplemented*, 324 U.S. 570 (1945) (approving the elimination of section of injunction enjoining violations "as charged in complaint"); *Louis W. Epstein Family Partnership v. Kmart Corp.*, 13 F.3d 762, 772 (3d Cir. 1994) (remanding to district court with instructions to strike from injunction an indefinite catch-all provision) ;[32] *but see*, *Manges*, 900 F.2d at 800 (remanding to district court with instructions to reform

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[30] The court does not imply that an arbitrator should reach any particular decision. In fact, an arbitrator may decide not to reach a decision on the merits. *See, e.g., Seaboard Acquisition*, 1983 WL 35470 (C.A.B. December 15, 1983) (dismissing seniority integration petition for delay in bringing claim).

[31] The court realizes that the right to arbitrate the LPP dispute may be of limited practical utility to the LPP Claimants. Any award that might be granted by the arbitrator would be an unsecured pre-petition claim and may come after the assets of the bankruptcy estate have been wholly depleted. While there was some evidence in the record of a reserve of unallocated stock (D. I. 15, Exhibit I, pp. 25-26), there is no evidence that such a reserve still exists or that it would exist at the time such an arbitration award might be granted.

[32] The court notes that the Third Circuit in *Epstein Family Partnership* did not remand for a more explicit or definite statement of prohibited activity.

the injunction); *Mitchell v. Seaboard System R.R.*, 883 F.2d 451, 454 (6th Cir. 1989) (drafting injunction and remanding to district court for its entry). To do any less than vacate the injunction would disregard the important public policies served by Rule 65(d) as articulated by Judge Wyzanski in *H.K. Porter Co. v. National Friction Prods. Corp.*, 568 F.2d 24 (7th Cir. 1977). There is no need to remand this matter to the bankruptcy court because (1) the injunction is invalid under Fed.R.Civ.P. 65(d) and is hereby vacated and (2) the bankruptcy court may not, in light of § 1113, enjoin the arbitration even if a new injunction met the requirements of Fed.R.Civ.P. 65(d).

5. Extension of Time to Appeal From Settlement

On September 9, 1994, the bankruptcy court denied the LPP Claimants' August 18, 1994, motion to extend the time to appeal the bankruptcy court's July 19, 1994, Order approving the Settlement Agreement of ALPA and Continental. The issue is whether the bankruptcy court erred in refusing to extend the time for the LPP Claimants to file an appeal.

In accordance with Bankruptcy Rule 8002(c),the bankruptcy court "may" extend the time for filing the notice of appeal for a period not to exceed 20 days from the expiration of time otherwise prescribed. The request for an extension must come within the 10 days allotted for filing the appeal. If within 20 days after the expiration of those 10 days a party can show "excusable neglect" for failing to provide notice of appeal, then the appeal may be allowed. Because the LPP Claimants moved for an extension of time within 20 days after the expiration of the original 10 day period, the bankruptcy court was permitted to grant the extension of time if the LPP Claimants showed excusable neglect.

The parties agree that this court reviews the denial of an extension of time to appeal for an abuse of discretion. *See Manhattan-Ward, Inc. v. Grinnell Corp.*, 490 F.2d 1183, 1186 (2d Cir. 1974); *Linder v. Trump's Castle Assocs.*, 155 B.R. 102, 104 (D.N.J. 1993); *In re Cordry*, 149 B.R. 970, 976 (D.Kan. 1992); (Civ. A. 94-496, D.I. 8 at 3 and D. I. 11 at 3).

In the Order approving the Settlement Agreement the bankruptcy court ruled:

> Continental is authorized to accept further elections by eligible pilots to participate in the Settlement Agreement for a period of sixty (60) days from the date of this Order, such further elections shall be treated as timely in all respects for all purposes under the Settlement Agreement. All other time periods or deadlines contained in the Settlement are also hereby extended by sixty (60) days.

The LPP Claimants interpreted this language as not only expanding the time by which an eligible pilot could decide to participate in the Settlement Agreement but also as expanding the period for an eligible pilot to appeal the Order approving the Settlement Agreement. (Civ. A. 94 - 496, D. I. 8 at 6).

In denying the motion for an extension of time, Judge Balick stated that the court did not extend the deadline for appeal by sixty days and, in fact, was not empowered to do so. (Civ. A. 94 - 496, D. I. 9 at A-117). Furthermore, the bankruptcy court found that "the neglect is not excusable" and that there would be "prejudice to the debtor and to the unsecured creditors." (Civ. A. 94 - 496, D. I. 9 at A-110).

The bankruptcy court did not abuse its discretion in denying the request for an extension of time to appeal. It fully considered the arguments of counsel, balanced the relevant factors and found that the actions of the LPP Claimants did not constitute excusable neglect. This court agrees with the bankruptcy court that the Order approving the Settlement Agreement cannot fairly be read to expand the time for appeal. Rather, it expanded the time for pilots to decide whether or not to participate in the Settlement Agreement. Therefore, the appeal of the LPP Claimants in Civ. A. 94 - 496 is denied. The LPP Claimants may not appeal the Order approving the Settlement Agreement.

IV. CONCLUSION

The decisions of the bankruptcy court are affirmed in part and reversed in part. The appeals originally captioned Civ. A.

93-163, 93-164, 93-177, 93-178, and 94 - 496 are denied, and the bankruptcy court is affirmed. The appeals originally captioned 93-250 and 93-255 are granted in part and denied in part.

The permanent injunction contained in Section 12.19 of the Plan of Reorganization is vacated. Otherwise, the bankruptcy court's orders of February 11, 1993; April 16, 1993; and September 9, 1994, are affirmed.